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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

STEPHEN W. DOWNEY,
Capital National Bank Building, Sacramento, California,
Solicitor for Respondent.

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Woodland, California,

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Willows, California,

PERCY NAPTON,
Woodland, California,
Of Counsel.

Subject Index

Page

The petition sets forth no grounds justifying the issuance of the writ 7

A.

"The Circuit Court of Appeals erroneously construed Section 70 e of the National Bankruptcy Act in denying trustee (petitioner) the election to recover value in an action under said section"..... 7

B.

"In a federal equity appeal, no new evidence can be received (U. S. Rev. Stat. Section 698; U. S. Code, tit. 28, Section 863" 13

C.

"There is no jurisdiction in a federal court of equity in a controversy arising out of bankruptcy to adjust the priorities and distribute the proceeds of the property of the bankrupt estate, that being the exclusive province of a court of bankruptcy under National Bankruptcy Act, Sections 2 (7), 47 (a), (2), and 70 (b), (c)"..... 16

D.

"The trustee is not precluded, in a suit on behalf of all creditors, from asserting that a transfer was fraudulent by the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent"..... 17

E.

"Under the law of California, a corporation of that state is prohibited from acquiring its own issued shares except under circumstances none of which appear in this record (California Civil Code, Section 309, in force in 1926)" 19

F.

"It was error to assume jurisdiction over the 2499 shares of defendant's stock by reason of the mere introduction of certain cancelled certificates in evidence"..... 21

G.

"The sale by the corporation of the stock acquired at a pledge sale held invalid constituted a conversion and

Page

therefore the money judgment was proper and should have been affirmed for that reason"..... 22

H.

"The decision of the Circuit Court of Appeals ignored the trial court's finding that the pledge of April 27, 1926, was void as to creditors for want of immediate delivery and a continued change of possession as required by Section 3440 of the Civil Code of the State of California".. 23

I.

"The trial court's findings of fact should not be reversed on appeal when based upon the testimony of witnesses heard and observed by the trial judge and also based on written evidence consistent with his findings and inconsistent with contrary findings"..... 25

The decision of the Circuit Court of Appeals is not in conflict with the decisions of the federal and state courts... 27

Conclusion 28

Table of Cases Cited

	Pages
Bell v. Bank of California, 153 Cal. 234	23
Brainard v. Cohn, 8 Fed. (2d) 13	10, 11
Casey v. Cavaroc, 96 U. S. 467	27
Connecticut Fire Ins. Co. v. McNeil, 35 Fed. (2d) 675	12
Cushing v. Building Association etc., 165 Cal. 737	21
Civil Code, Section 3439	11
Civil Code, Section 3440	23, 24
Dibert v. Wernicke, 214 Fed. 672	23
Feilback Co. v. Russell, 233 Fed. 412	23
Harvey v. Stowe, 219 Fed. 17	28
Henning v. Akin, 91 Cal. App. 246	23
Hilliker v. Kuhn, 71 Cal. 220	25
Llewelyn v. Levi, 157 Cal. 31	25
Lowe v. Ozmun, 3 Cal. App. 387	22
Magnum Import Co. v. Houbigant, Inc., 262 U. S. page 159 (162)	7
Manor v. Dunfield, 33 Cal. App. 560	25
McFall v. Buckeye etc. Assn., 122 Cal. 468	27
Moore v. Bay, 284 U. S. 4	19
National Bankruptcy Act, Sec. 70 e	9, 10, 11, 12
Oliver v. Brennan, 299 Fed. 106	11
Ralston v. Bank of California, 112 Cal. 208	20
Rules of the Supreme Court of the United States, Rule 38, Subdivision 5	7
Schainman v. Dean, 24 Fed. (2d) 475	10
Sexton v. Kessler & Co., 172 Fed. 535	25
Smith v. Mott, 76 Cal. 172	25
Stevens v. Boyes Hot Springs Company, 113 Cal. App. 479	20
Stewart v. Stewart Hotel Company, 33 Cal. App. 167	20
Wacy v. Holbrook, 125 N. Y. S. 1088	12
Wiener v. Union Trust Co., 261 Fed. 709	25

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PETER BARCELOUX COMPANY (a corporation),
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

The respondent, Peter Barceloux Company, is a family corporation organized in 1912. Peter Barceloux had the management and control of the corporation until his death in 1918.

At the time of the organization of the corporation, Certificate No. 5 representing 2499 shares of the capital stock of the company was issued to Henry Joseph Barceloux.

Prior to April 27, 1926, the date of the first transaction involved in this action, Henry Joseph Barceloux delivered Certificate No. 5 to his brother-in-law, Fred Gelinas, secretary of the corporation, as security for his indebtedness to the corporation, and for any future indebtedness that might be incurred by him. No formal pledge agreement was executed at the time. It is undisputed that the stock remained in the possession of the secretary until Henry Joseph Barceloux was elected president of the corporation when it came into his possession as such president, together with the other books, papers and records of the company. At no time did Henry Joseph Barceloux have any possession of the certificate otherwise than as an officer of the corporation.

Henry Joseph Barceloux continued to borrow money. On April 27, 1926, he executed a formal pledge agreement covering the pledge of Certificate No. 5.

On June 29, 1926, he pledged 75 shares of the Pacific National Fire Insurance Company; 9 shares of the Bank of Orland and 100 shares of the Glenn County Garage as security for the indebtedness therein mentioned.

At the time of the pledges of April 27, 1926, and June 29, 1926, Henry Joseph Barceloux and George R. Freeman, administrator of the estate of Frank Freeman, deceased, which held a judgment against Barceloux, were cooperating to enforce that judgment against Charles Donohoe. Their relations were amicable and Freeman was familiar with all of the business affairs of Mr. Barceloux.

The pledge agreement attacked in this action provides that any surplus after the payment of the demands secured thereby should be subject to the order of Henry Joseph Barceloux, except it might be applied at the time of the sale of such pledged property, to any other obligations not mentioned therein held by the company against Henry Joseph Barceloux. It also clothed the company with power "to sell at any time after such notes or interest is due, *without notice or demand,* at the option of the said Peter Barceloux Company the whole or any part of said security, either at public or private sale at their discretion and without notice or demand."

This action only involves the validity of the pledges of April 27, 1926, and June 29, 1926, and does not involve the validity of the pledge previously made by delivery of the stock to Peter Barceloux and thereafter held by the corporation as collateral. No attack is made on the legality of the pledge made prior to April 27, 1926.

In June, 1926, Mr. Freeman requested Henry Joseph Barceloux to secure the payment of the Freeman judgment. It appears by the uncontradicted testimony of Freeman, that he knew of the pledge of the stock to the Peter Barceloux Company. After investigating the affairs of Henry Joseph Barceloux, he accepted from him an assignment of the 2499 shares of the company, subject to the pledge mentioned, with full knowledge of the facts.

Transcript of Record, page 411.

In November, 1926, Mr. Freeman issued an execution on his judgment, but did not levy on the stock

in question. In fact, no question was ever raised regarding the validity of the pledges or the sale thereunder until the filing of this action on April 30, 1928.

Barceloux was adjudicated a bankrupt on February 25, 1927.

Petitioner filed a bill in equity attacking the validity of the pledges of April 27, 1926, and June 29, 1926, on the ground of fraud and irregularities in the sale of the stock to satisfy the pledges.

The fraud relied upon was that the pledge was made for the purpose of defeating the collection of the Freeman judgment. All of the evidence was directed to this point. Although the non-kindred creditors of the bankrupt are mentioned in the bill, no evidence was offered that there was any design or intent to hinder, delay or defraud any creditor, except Freeman.

The Circuit Court of Appeals held that there was no fraud for the reason stated in the opinion, and particularly because Freeman, the principal and only active creditor of Henry Joseph Barceloux, with full knowledge of the transfer by pledge, accepted an assignment subject thereto.

Under these circumstances, it cannot seriously be argued that there was any fraud or any attempt to deceive or delay the collection of the Freeman judgment.

At the time he took his assignment, subject to the pledges of the company, he could have levied an execution and sold the property of the bankrupt subject to the pledges. Instead of taking this course, he

accepted an assignment which gave to him all of the right, title and interest of the bankrupt subject to the pledge.

Furthermore, the fact that the Barceloux Company did not take an absolute transfer of the stock in satisfaction of its debt, but only accepted it as security, leaving all of the value over and above the amount of its pledge subject to the claims of the creditors, conclusively demonstrates that there was no fraud.

The only irregularity in the sale was that an item of indebtedness of $1800.00 due from the bankrupt to Peter Barceloux was included in the demand for which the property was sold. The Circuit Court of Appeals holds that while the legal title to this demand was in Peter Barceloux and not the company "nevertheless the claim therefor was made in good faith."

In the last analysis, the Court makes no determination of the regularity of the sale because of the offer of the respondent to resell the property. The Court says at page 482 of the transcript of the record: "We hold that the pledge was valid and that appellee at most is entitled to what the appellant concedes, namely, a sale of all stock pledged, under an order of Court and to an application of the proceeds to the claims of the Barceloux Company." The decree further provides that if the stock pledged to the company sells for more than the amount due as determined by the Court, the surplus shall be paid to the trustee to be applied to the claim of Freeman as alleged in the complaint; any surplus over and above these two claims shall be applied to the claims of the general creditors.

Having reached the conclusion that the pledge was valid, the Court could direct that either of two courses be followed:

First. Enter a judgment of reversal on the grounds that the pledge was valid and the sale was irregular.

Under such a judgment the Peter Barceloux Company would be compelled to resell the property pursuant to the terms of its pledge. As we have pointed out, the pledge agreement covered the property involved in this action authorizing a sale of the property without notice or demand.

Therefore, if this course had been followed by the Court, it would be within the power of the Peter Barceloux Company to sell without notice or demand.

However, the Court for the benefit and not to the detriment or disadvantage of the petitioner, included in its judgment a reversal on direction that the property be sold and that the Trial Court should fix the time, place and terms of the sale of the stock and to direct the application of the proceeds of the sale in accordance therewith.

Much of the argument of petitioner is based upon this provision of the decree. Our answer to that argument is, as stated, that the petitioner was not prejudiced but was benefited.

If such limitation had not been placed upon the power of the corporation to resell to satisfy its pledge, it could under the laws of California, sell the property in question without notice.

If the rights of any one are restricted or limited by the terms of the decree, it is the rights of the respondent and not the petitioner.

THE PETITION SETS FORTH NO GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

Rule 38, Subdivision 5, of this Court, enumerates the ground on which a writ of certiorari will issue, specifically provides that it is not a matter of right, but of sound judicial discretion, and that the writ will be granted only where there are special and important reasons therefor.

To emphasize the point, we quote the following from the opinion of this Court in *Magnum Import Co. v. Houbigant, Inc.*, 262 U. S. page 159 (162):

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The petitioner makes a feeble attempt to rely on the grounds that the decision of the Circuit Court of Appeals is in conflict with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals.

Petition, page 11.

The significant feature of this petition and the argument is that the petitioner does not in a single instance point out any conflict between the decision of

the Circuit Court and the other cases referred to in the petition.

It is only fair and reasonable to assume that if such conflict exists, the petitioner would have been only too happy to point out the same.

This Court is not called upon to assume the burden of analyzing the cases referred to in the petition without some assistance from counsel.

The very fact that no conflicts really exist between the cases mentioned is apparent from the statement in the petition:

> "And the decision of the Circuit Court of Appeals on this question is a decision of an important question of local law in a way *probably in conflict* with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals" (italics ours).

So, we find an absence of any direct statement that there is a conflict, but only the qualified statement that the decision is *probably* in conflict with other decisions of Courts mentioned.

Clearly, a writ of certiorari cannot be issued under the rules of this Court on the ground of conflicting decisions in the absence of a showing to that effect. The fact that the petitioner qualifies his statement with the word "probably" is in itself an admission that no such conflict exists.

We therefore, at the outset make the point that this petition should be dismissed because it does not state any grounds bringing it within the rule above mentioned.

It is apparent that the petitioner is imbued with the idea that the object of the writ is to give the defeated party another hearing.

Consequently, we will review the cases mentioned in the petition and argument of petitioner as being in conflict with the decision of the Circuit Court of Appeals. It will appear therefrom that there is absolutely no conflict and that the decision of the Circuit Court is in harmony with all of the points decided.

We will now take up a discussion of the argument of counsel and for convenience will adopt the order in which the points are discussed.

A.

"THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70 e OF THE NATIONAL BANKRUPTCY ACT IN DENYING TRUSTEE (PETITIONER) THE ELECTION TO RECOVER VALUE IN AN ACTION UNDER SAID SECTION."

A complete answer to this point is that the Circuit Court of Appeals did not construe Section 70 e of the National Bankruptcy Act as denying the petitioner the election to recover the value of the property in an action under that section. This is manifest from a reading of the opinion, and this statement is entirely contrary to the holding of the Circuit Court of Appeals.

This transfer was made more than four months prior to bankruptcy. In that case the trustee is authorized by Section 70 e to maintain an action to avoid any transfer "which any creditor of such bankrupt might have avoided," and may recover the property

so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

The Circuit Court held, as appears in the opinion, page 474 of the Transcript of the Record, that under this section, the trustee is simply authorized to enforce the rights of creditors in accordance with the laws of the state applicable to the transaction.

This is in harmony with all of the decisions on the subject.

In *Schainman v. Dean,* 24 Fed. (2d) 475, the Court said with reference to Section 70e:

> "Under this section it is option with the trustee whether he shall proceed at law or in equity, and whether he shall pursue the goods, or sue for their value, or for their conversion."

Neither the respondent nor the Circuit Court of Appeals has taken the position that the trustee has no such election.

The question before the Court was, the trustee having elected to file a bill in equity, and it appearing that the property in question was available to satisfy the judgment, a Court of Equity would direct the return of the property.

In *Brainard v. Cohn,* 8 Fed. (2d) 13, which, it is claimed, conflicts with the decision in this case, it is held that the District Court had jurisdiction to invalidate any transfer by the bankrupt of his property which any creditor might have avoided, giving the trustee the right to recover the same. It is also held

in that case that the District Court has equity jurisdiction to set aside a transfer made by a bankrupt and to subject the property to the administration of a Court of bankruptcy.

In this case the transfer has not been set aside, but upheld.

If the Court had sustained the claim of fraud, then under the authority of that case, the trustee had the right to recover the property and subject it to the administration of the court of bankruptcy.

However, that rule could not be applied in the *Brainard* case because the property had been mixed and confused beyond possible identity with the property of the defendants; that the intermixture was intentional. For that reason a money judgment was entered.

In *Oliver v. Brennan,* 299 Fed. 106, another case which petitioner claims is in conflict with this decision, the same construction was given to Section 70 e. The only objection made to the decree was that it was too uncertain and indefinite.

Referring to page 474 of the Transcript of Record, the discussion of the Circuit Court of Appeals on this subject will be found. The Court ascertains and determines the right of the trustee to be that of creditors under Section 3439 of the California Civil Code, and cites a decision of that State as to the relief to be granted in such cases.

Section 70 e does not "enable the trustee, as a liquidating officer for all the creditors, to recover that

which is more advantageous to the creditors with the least possible litigation."

Petition, page 23.

The construction of this section gives to the trustee all of the power and authority vested in him by Section 70 e.

On page 24 of the petition it is asserted that the Circuit Court of Appeals has decided that in any creditor's suit against a fraudulent transferee of property, a money decree could not be entered if at the time of the decree the specific property may be reached and subjected to the creditor's claim.

The Court is dealing with the subject of the relief that could be granted in an equity proceeding to set aside a transfer of property in fraud of creditors.

The equity rule is declared in the case of *Wacy v. Holbrook,* 125 N. Y. S. 1088, cited in the opinion of the Court, Transcript of the Record, page 476.

Where equity acquires jurisdiction, it disposes of the entire controversy and its incidents.

If it appears in an equity proceeding from the facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the plaintiff is entitled to the only alternative relief possible of damages, the Court may and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the case and decide all the issues involved.

Connecticut Fire Ins. Co. v. McNeil, 35 Fed. (2d) 675.

As appears from the opinion, the Court was dealing not with any right of election on the part of the trustee, but with the question of what relief should be granted in a Court of Equity in an action of fraud where it appears that the property transferred could be restored to the plaintiff by decree of the Court.

However, it would seem that this question is not involved in the petition now pending because as we have shown, the reversal was ultimately based on the finding that the pledge was valid.

If the Court had sustained the finding of fraud and reversed the case on the ground that the plaintiff should take the property and not damages, the question might be involved.

B.

"IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT. SECTION 698; U. S. CODE TIT. 28, SECTION 863)."

We need not concern ourselves with the question of the introduction of new evidence in an equity appeal because no such question is involved.

The Court did not receive any new evidence. The certificate of stock in question was introduced in evidence in the Trial Court. As we have already shown, that part of the decision directing the sale of the stock was not based on the introduction of the certificates in evidence, but was due to the desire of the Court and the respondent to end the litigation. The respondent voluntarily in open Court subjected the stock to the jurisdiction of the Court.

All of this was to the advantage of the petitioner.

Aside from the question of the reception of the offer of counsel, the decree was within the issues and is fully supported by the evidence.

Paragraph IX of the complaint alleges that George A. Barceloux purchased the property at the pledge sale August 16, 1926, and has at all times thereafter and still does purport to hold and possess said securities as owner thereof.

Transcript, page 11.

The answer admits the purchase, but denies that Barceloux has at all times since the purchase either owned or purported or claimed to hold or possess the securities.

Transcript, page 26.

At the trial, George A. Barceloux testified that he gave his promissory note for the purchase price of these securities and pledged the same as collateral. He also testified that all of the securities had been transferred to the respondent prior to the trial, and his note returned.

Transcript of Record, page 418.

Regardless of the proceedings in the Circuit Court of Appeals, the record clearly shows the ownership and possession of the shares in question, except such as had been sold, and if there had been any question on the point, the proper judgment for the Court to enter was to direct the sale of the securities if they were on hand, and if not, that the petitioner have a money judgment for the value thereof.

This is the effect of the decision of the Circuit Court of Appeals.

However, in view of the holding of the Court that the pledge was a valid transaction, the Court could not under any circumstances have awarded or directed a judgment in favor of the petitioner for either the stock or its value.

The argument of the petitioner is based on the assumption that the Circuit Court of Appeals has sustained the finding of fraud and invalidated the pledge. Such is not the decision.

So the proposition reduces itself to the correctness of the decision of the Circuit Court of Appeals holding that the pledge was valid and directing the sale of the property with the consent of the respondent instead of a reversal without directions.

As to the action of the Circuit Court of Appeals in crediting the amount due the respondent with the value of these shares, petitioner cannot complain. Had no such credit been made by the Court, the company would have been compelled to credit this amount on the indebtedness before making the sale.

Again, if the company had credited the amount, the credit of the company would have been for the amount actually received, while the credit directed by the Court is for the value as found by the Master.

Again, the petitioner profits by the decision.

C.

"THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT SECTIONS 2 (7), 47(a), (2), AND 70 (b), (c)."

This assignment finds no support in the record. The Circuit Court of Appeals made no attempt to adjust the priorities and distribute the proceeds of the property of the bankrupt estate.

On the contrary, in this action the Circuit Court of Appeals had the respondent as pledgee, Freeman as the owner claiming the property subject to the pledge, and the trustee in bankruptcy representing the creditors as parties. The determination of the Court was between these three parties involved in the action, and it in no way attempted to determine the priorities of creditors in violation of the provisions of the Bankruptcy Act.

It is stated that Freeman was not a party to the suit and that no claim of his remained involved in this suit.

This is a strange argument in view of the bill filed by the petitioner in which the relief he seeks is the value of the property in excess of the amount due Freeman under his assignment.

See prayer of the complaint, Transcript of Record, page 13, where the relief asked for is

> "For the value of all of said shares of stock at the time of said sale, to wit, August 16th, 1926, less such sum, if any, as may be found to be due

or owing to George R. Freeman, as administrator of the estate of Frank Freeman, deceased."

So, how can the petitioner complain of a judgment which directs the application of the proceeds of the sale in strict accordance with the prayer of his bill?

The Bankruptcy Court takes jurisdiction of the priorities of the creditors after the property has reached the hands of the trustee.

D.

"THE TRUSTEE IS NOT PRECLUDED, IN A SUIT ON BEHALF OF ALL CREDITORS, FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXISTENCE OF THE TRANSFER ASSAILED AS FRAUDULENT."

We repeat that the Circuit Court of Appeals did not decide that the trustee was precluded from maintaining an action to set aside a fraudulent transfer by reason of the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent.

At no time has any such argument been made by respondent, and such a statement is a plain misinterpretation of the Court's decision.

In its opinion, the Circuit Court of Appeals considered the case from the standpoint of Freeman alone, and likewise from the standpoint of the creditors generally.

To assert that this action was prosecuted on the basis of a design on the part of the respondent to

commit a fraud against the general creditors is to ignore the entire record and theory of petitioner.

As we have already indicated, this transaction was attacked on the ground that it was designed to defraud Freeman.

By reference to the opinion it will be noted that on page 472 of the Transcript of the Record, the Court held that Freeman ratified the transaction by accepting an assignment subject to the pledge at a time when he believed there was ample equity to secure his claim.

The Court first decides that there was no fraud committed on Freeman.

It then on page 472 takes up the question of the rights of the trustee as representative of creditors other than Freeman.

Attention is directed to the fact that the complaint does not allege the existence of a single creditor other than Freeman, nor that any other creditor was affected by the pledge and sale.

As stated by the Court, "the case was tried with his rights particularly in view."

The Court holds that neither the pleading nor the proof will sustain a finding of fraud against the creditors other than Freeman.

The Court did not hold that there was any estoppel. No question of estoppel is involved in the decision. The Court holds that the evidence was insufficient to establish a claim of fraud against Freeman and that neither the pleading nor the proof was sufficient to

justify that any fraud was committed on the general or non-kindred creditors of the bankrupt.

The statement appears at the bottom of page 31 of the petition:

> "The decision of the Circuit Court of Appeals deprives the Trustee (an officer of the Court) of the right of representing all creditors granted to him by Section 70 e of the National Bankruptcy Act,"

and that the construction placed on that section is in conflict with *Moore v. Bay,* 284 U. S. 4.

Again, we repeat that the Court has made no such decision as is evident from the discussion in the opinion as to the rights of Freeman and the rights of general creditors.

The opinion simply holds that in this action, the trustee has failed to establish fraud either against Freeman alone or the creditors generally.

E.

"UNDER THE LAW OF CALIFORNIA, A CORPORATION OF THAT STATE IS PROHIBITED FROM ACQUIRING ITS OWN ISSUED SHARES EXCEPT UNDER CIRCUMSTANCES NONE OF WHICH APPEAR IN THIS RECORD (CALIFORNIA CIVIL CODE, SECTION 309, IN FORCE IN 1926)."

In the first instance, the petitioner claims, according to his pleading, that the pledge was fraudulent and the sale therefore invalid.

On this assumption the property would still be vested in the bankrupt.

For the purposes of making this point, the petitioner takes the inconsistent position that George A. Barceloux acquired the legal title to the stock by purchase at the pledgee's sale. It is then argued that the corporation had no power to repurchase this stock from George A. Barceloux.

The stock was sold to George A. Barceloux and he repledged the same to the corporation to secure his promissory note for the purchase price.

On the authority of *Ralston v. Bank of California,* 112 Cal. 208, this repurchase was valid and legal.

There is nothing in the *Stevens v. Boyes Hot Springs Company,* 113 Cal. App. 479, that conflicts with the *Ralston* case.

In the *Stevens* case, there was an outright purchase of the stock by the corporation. The stock was not acquired by the corporation in satisfaction of a pledge.

The whole subject is reviewed in the case of *Stewart v. Stewart Hotel Company,* 33 Cal. App. 167, and the Court announces that there are exceptions to the general rule as to the power of a corporation to purchase its stock.

As in other instances, petitioner contents himself with the mere generalization that the decisions are conflicting without pointing out any particulars in which they conflict.

There is no conflict.

F.

"IT WAS ERROR TO ASSUME JURISDICTION OVER THE 2499 SHARES OF DEFENDANT'S STOCK BY REASON OF THE MERE INTRODUCTION OF CERTAIN CANCELLED CERTIFICATES IN EVIDENCE."

This point is covered in the foregoing discussion.

Suffice it to say that the Court did not assume jurisdiction by reason of the mere introduction of certain cancelled certificates in evidence. The decision of the Court is not based on any such foundation.

As we have shown, the undisputed evidence establishes the fact that the title to this stock stands in the name of the corporation. The certificates are in the possession of the Court, and the respondent stipulated in open Court that the Court may enter a judgment directing the sale of the stock.

As already appears, this action of the Court was more favorable to the petitioner than if the Court had reversed the case without any direction as to the terms and manner of sale, leaving the respondent in a position under the laws of the State, to legally sell the stock in question without notice.

Had the Court decided that the pledge was valid, but the sale was irregular and invalid, still it is the established law of California that the purchaser acquires the rights of the original pledgee, and that the debtor, or his successors may not take the property from such purchaser without discharging or offering to discharge the original obligation.

Cushing v. Building Association etc., 165 Cal. 737.

This case also holds that discharge of the original obligation is essential to the extinguishment of the lien of the pledge possessed by the party who is in possession of the property. Neither the pledgor nor his successors can treat the sale by the pledgee as ineffectual to absolutely transfer the pledged property and at the same time treat it as effectual to the extent of extinguishing the obligation for which the property was held in pledge. The same rule applies where the pledgee made the unauthorized sale to himself.

G.

"THE SALE BY THE CORPORATION OF THE STOCK ACQUIRED AT A PLEDGE SALE HELD INVALID CONSTITUTED A CONVERSION AND THEREFORE THE MONEY JUDGMENT WAS PROPER AND SHOULD HAVE BEEN AFFIRMED FOR THAT REASON."

No such question is now involved in this action.

If judgment had been awarded to petitioner, then the question of the relief to which he was entitled would be involved.

Here, the Court having held that the pledge was valid, there is no question of conversion.

In the case of *Lowe v. Ozman,* 3 Cal. App. 387, cited in the petition, it is held that to constitute a conversion, it is necessary to show a defiance of the pledgor's rights.

How can there be any claim of conversion when the sale was made pursuant to a contract or pledge, and in accordance with the terms thereof. In no instance has there been any defiance of the pledgor's rights.

Mere irregularity in a sale neither destroys the pledge nor amounts to a conversion.

The Court did not hold the pledge sale invalid as stated in the argument. Neither has the respondent at any time repudiated the pledge.

The case of *Bell v. Bank of California,* 153 Cal. 234, does not deal with the question of conversion but only involves the statute of limitations.

In *Henning v. Akin,* 91 Cal. App. 246, plaintiff was seeking to recover the surplus remaining in the hands of the pledgee over and above the debt after an invalid sale of the pledged property.

In *Dibert v. Wernicke,* 214 Fed. 672, the pledgee purchased at his own sale and for the avowed purpose of acquiring ownership.

Feilback Co. v. Russell, 233 Fed. 412, involved the sale of property acquired under a preferential transfer made within four months of the adjudication of bankrupt.

H.

"THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORED THE TRIAL COURT'S FINDING THAT THE PLEDGE OF APRIL 27, 1926, WAS VOID AS TO CREDITORS FOR WANT OF IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA."

The Circuit Court of Appeals did not ignore the question of a change of possession under Section 3440 of the Civil Code.

On page 470 of the opinion, the Court discusses the views of the Trial Court on the subject of delivery, and held that it depended upon the weight to be given to the testimony of Henry Barceloux.

If we disregard the testimony of H. J. Barceloux, then there is an absence of evidence on the subject of delivery.

The bill alleges that Barceloux purported to deposit with the Peter Barceloux Company the securities in question.

Transcript, pages 4 and 5.

On page 6 of the transcript it is alleged:

> "And that said defendant accepted said additional security knowing of such intent of Henry Joseph Barceloux and when it already possessed property of said Henry Joseph Barceloux as security for such indebtedness."

So the pleading itself alleges a delivery to the corporation.

According to the testimony of Barceloux, the stock was delivered to the secretary of the corporation long prior to April, 1926; that the only time that Barceloux had any control over it was during the period that he was president of the company when he took possession of all of its assets; that upon his resignation as president, the stock was turned over to his successors.

It is settled by the California authorities that even after the delivery of personal property under Section 3440, the party making the delivery is not precluded

from having some connection or control thereof if consistent with the original transaction.

Manor v. Dunfield, 33 Cal. App. 560;
Hilliker v. Kuhn, 71 Cal. 220.

It is not denied that the stock was delivered to the corporation under the pledges of April and June, 1926, and thereafter continuously remained in the possession of the officers of the corporation.

H. J. Barceloux had nothing to do with these shares of stock after this pledge and his resignation. This was made more than four months prior to bankruptcy.

Llewelyn v. Levi, 157 Cal. 31;
Wiener v. Union Trust Co., 261 Fed. 709;
Sexton v. Kessler & Co., 172 Fed. 535.

The property being already in possession of the defendant, no redelivery to him was necessary.

Smith v. Mott, 76 Cal. 172.

I.

"THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED ON APPEAL WHEN BASED UPON THE TESTIMONY OF WITNESSES HEARD AND OBSERVED BY THE TRIAL JUDGE AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS."

The decision of the Circuit Court of Appeals is based upon the undisputed evidence. It is supported by the testimony of Mr. Freeman called as a witness for the petitioner. George and Henry Barceloux and Mrs. Gelinas were also called as witnesses by the petitioner.

No proof outside of the testimony of these witnesses was produced by petitioner. If the testimony of George and Henry Barceloux and Mrs. Gelinas is rejected, then the petitioner stands without proof other than the testimony of Mr. Freeman.

The only conflict between the testimony of Mr. Freeman and H. J. Barceloux is that Mr. Freeman claimed that Mr. Barceloux stated the indebtedness was $24,000.00 when it was in fact $35,000.00. This variance is of no consequence on the issue of fraud.

There is no conflict in the evidence as to the pledge transaction and Mr. Freeman's knowledge of it, and his acceptance of an assignment subject to the pledge.

Mr. Freeman also testified that he considered Mr. Barceloux solvent at the time of the pledge. The pledge was for an adequate and valuable consideration.

It is undisputed that H. J. Barceloux was indebted to the corporation.

The petitioner points out no written evidence inconsistent with any statement of fact made in the opinion. On the contrary, all of the written evidence on the subject is consistent with the pledge. All of the transactions between H. J. Barceloux and the company were entered in the books of the corporation, and there is not a single writing in the evidence inconsistent with the validity of the pledge or that it was made in good faith.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE FEDERAL AND STATE COURTS.

We have already reviewed the cases cited on page 12 of the petition.

On page 38 of the petition it is claimed that the decision is in conflict with the cases cited on that page.

We repeat that petitioner has not pointed out any conflict. An examination of the cases shows that there is no conflict.

Casey v. Cavaroc, 96 U. S. 467, deals with the French law and the civil law. We take this excerpt from page 479:

> "So, if it be delivered back to the owner in a new character; as, for example, as a special bailee or agent. In such case, the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons."

This disposes of any claim of failure of delivery based on the proposition that the stock certificates were in the hands of H. J. Barceloux as president of the company.

The claim is also unsound because the stock was in possession of other officers of the company a long time before he became president, and was also continuously in the custody of other officers of the company after the pledge of April, 1926.

In the case of *McFall v. Buckeye etc. Assn.*, 122 Cal. 468, it was held that there was no delivery because the stock was immediately returned.

Harvey v. Stowe, 219 Fed. 17, holds that it is unnecessary to change the registration of the stock to constitute a valid pledge and that under the facts in that case there was a delivery.

CONCLUSION.

With the exception of the point that the decision of the Circuit Court of Appeals is in conflict with the decisions of the State and Federal Courts, there is nothing in the petition bringing it within the rule governing the issuance of certiorari by this Court. The petition does not in any instance show any conflict between the decisions but is based upon the mere generalization that it is probably in conflict with the cases cited in the petition.

This petition is merely an effort on the part of the petitioner to secure another hearing on the whole case by this Court, which practice is contrary to its rules and its decisions.

Dated, Woodland, California,
January 6, 1933.

Respectfully submitted,
STEPHEN W. DOWNEY,
Solicitor for Respondent.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
PERCY NAPTON,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this 7th *day of January, 1933.*

Robt. J. Devlin

Wm L. Devlin

Arthur C. Devlin

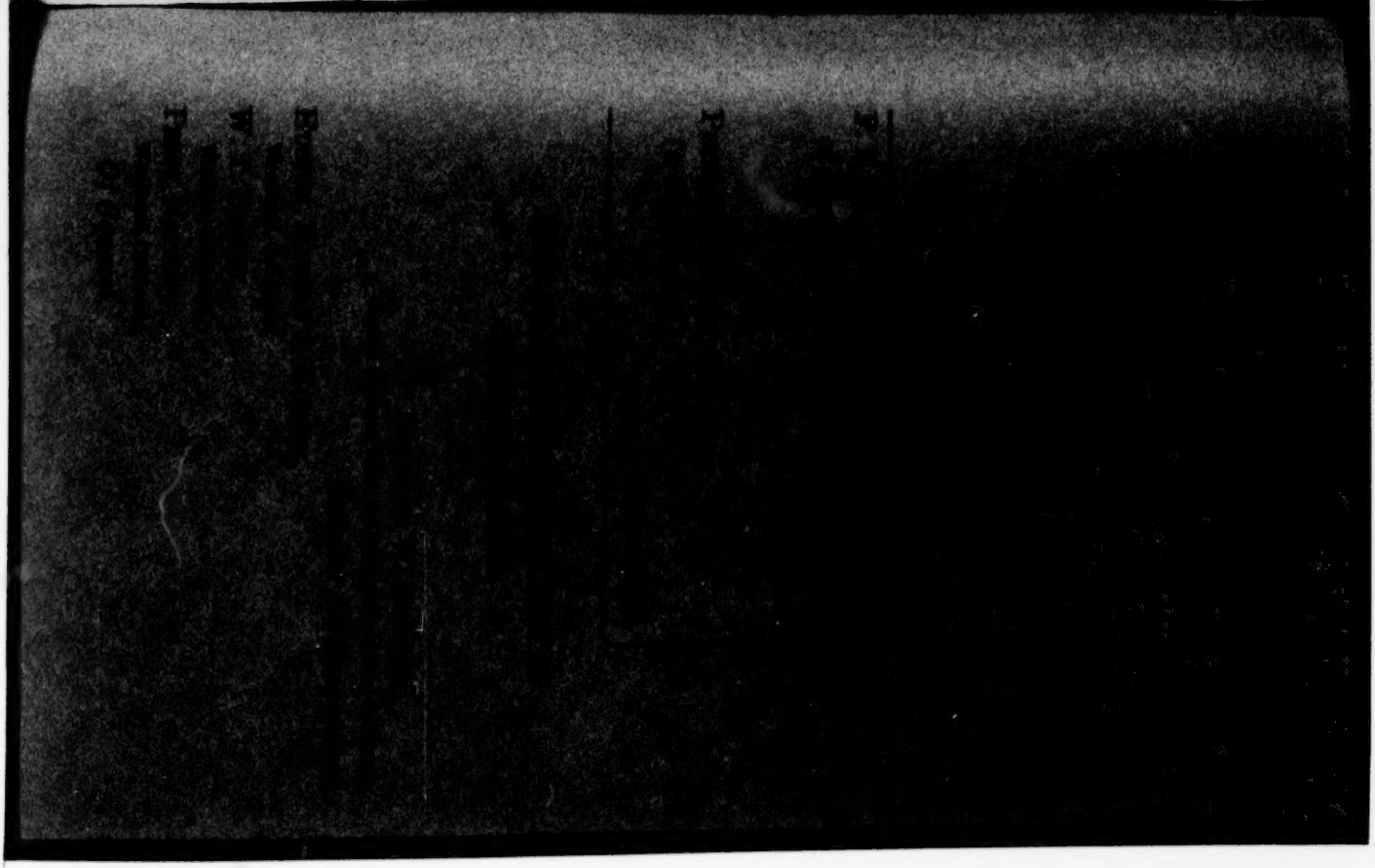
A. I. Dickenbrock

Horace B. Stulff

George A. Freeman

George F. Longsdorf

Solicitors for Petitioner.



Subject Index

Page

The petition sets forth no grounds justifying the issuance of the writ 1

Statement of facts 2

The evidence is sufficient to sustain the finding of the Circuit Court of Appeals that there was no fraud, and is wholly insufficient to sustain the finding of fraud made by the trial court..... 26

The Circuit Court did not erroneously construe Section 70e of the Bankruptcy Act; neither is a money decree for the value of the property the only or proper relief... 31

The Circuit Court of Appeals did not take any new evidence 45

The decision of the Circuit Court of Appeals only determines the rights of the parties to the action and does not in any way attempt to adjust the priorities of the creditors of the bankrupt..... 48

The Circuit Court of Appeals did not decide that the trustee is precluded in a suit on behalf of all the creditors from asserting that a transfer was fraudulent by the fact that one of the creditors took additional security which recited the execution of the transfer assailed as fraudulent 50

The transfer of the securities by George A. Barceloux in satisfaction of the pledge to the company was valid and in accordance with the laws of the State of California..... 53

This is not an action for conversion nor was the respondent guilty of conversion if there were some irregularities in the sale 54

There was an immediate delivery and a continued change of possession as required by Section 3440 of the Civil Code of the State of California..... 60

There is no substantial conflict in the evidence and all of the written evidence is inconsistent with the claim of fraud 65

The securities were not sold for any indebtedness not secured by the pledge..... 70

The pledge sale was regularly and fairly conducted..... 73

Page

Other grounds disclosed by the record relied upon by respondent as grounds for reversal and not decided by the Circuit Court of Appeals 75

The court had no jurisdiction to enter a judgment for the full value of the property pledged because petitioner is only entitled to the value of the property as of August 16th less the amount due on the Freeman judgment 76

The court had no jurisdiction to enter judgment in excess of the value alleged in the complaint, and particularly for the highest market value between the date of the pledges and the audit 79

Assuming that petitioner was entitled to recover the highest market value, still the value fixed by the master and by the judgment is not the highest market value under the law 83

That the valuation of the stock of the Peter Barceloux Company has not been fixed as required by law because essential factors affecting the fixing of the value of the stock were disregarded by the master 85

The petitioner is not entitled to recover even if the pledges attacked are fraudulent and void because of the antecedent pledge shown by the undisputed testimony of the witnesses called by petitioner, the endorsement on certificate No. 5, and the possession of that certificate by the respondent 86

Freeman was a necessary party to the action 87

Conclusion 90

Table of Statutes Cited

	Pages
California Code of Civil Procedure:	
Section 389 (App. p. i)	88
Section 2055 (App. p. i)	28
California Civil Code:	
Section 1712 (App. p. ii)	56
Section 1914 (App. p. ii)	73
Section 3333 (App. p. ii)	81
Section 3336 (App. p. ii)	81, 82
Section 3432 (App. p. iii)	26
Section 3439 (App. p. iii)	26, 32
Section 3440 (App. p. iii)	60, 62, 63
National Bankruptcy Act:	
Section 70a (6)	55, 56, 57
Section 70e (App. p. vi)	31, 37, 51, 56, 57

Textbooks and Encyclopedias

	Page
California Jurisprudence, Vol. 12, p. 1012	67
Corpus Juris, Vol. 27, p. 855	42
Ruling Case Law, Vol. 12, p. 641	80

Table of Cases Cited

	Pages
Ambassador Petroleum Co. v. Superior Court, 208 Cal. 671	89
Armstrong v. Lassen Lumber & Box Co., 204 Cal. 533	83
Bell v. Bank of California, 153 Cal. 234	59
Bland v. Fleeman, 29 Fed. 669	89
Brainard v. Cohn, 8 Fed. (2d) 13	37, 38
Brown, In re, 199 Fed. 356	31
Cole v. Ralph, 252 U. S. 286	76
Connecticut Fire Ins. Co. v. McNeil, 35 Fed. (2d) 675	36
Dana v. Stanford, 10 Cal. 278	26
Dibert v. Wernickle, 214 Fed. 672	59
Dravo v. Fabel, 132 U. S. 487	28
Dunphy v. Kleinschmith, 78 U. S. 610, 11 Wall. 610	39, 40, 41
Entwisle v. Seidt, 155 Fed. 864	31
Feeley v. Boyd, 143 Cal. 282	62
Feilbach Co. v. Russell, 233 Fed. 412	60
Figa[illegible] Oleese, 184 Cal. 775	28
Freeman v. Donohoe, 180 Cal. 170	14
Globe Bank & Trust Co. v. Martin, 236 U. S. 288	48
Griffin v. Smith, 177 Cal. 482	49, 58
Hawks, In re, 204 Fed. 310	31
Heath v. Wilson, 139 Cal. 366	26, 27
Henning v. Akin, 91 Cal. App. 246	59
Henry v. Phillips, 165 Cal. 134	85
Hilliker v. Kuhn, 71 Cal. 220	62
Hiscock v. Varick Bank, 206 U. S. 28	49, 73
Horan v. Consolidated Mining Co., 41 Cal. App. 337	80
Hornbuckle v. Toombs, 85 U. S. 648	40
Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734	49
Lightner Mining Co. v. Lane, 161 Cal. 704	83
Lowe v. Ozmun, 3 Cal. App. 387	59
Lynch v. McGhan, 7 Cal. App. 132	81
Manders v. Wilson, 230 Fed. 536	33
Manor v. Dunfield, 33 Cal. App. 560	62
Meisner v. McIntosh, 205 Cal. 11	78, 79
Moore v. Bay, 284 U. S. 4	51

Pages

McCabe v. Healy, 138 Cal. 89 89
McKee v. Title Insurance Co., 159 Cal. 217 27
McMullen v. Zabawski, 283 Fed. 552 33

Niles-Bement Pond Co. v. Iron Moulders Union, 254 U. S. 77, 65 L. Ed. 147 89

Off v. Hakes, 142 Fed. 364 34
O'Connor v. Irvine, 77 Cal. 435 89
Oliver v. Brennan, 299 Fed. 106 ..... 37, 38

Payne v. Elliott, 54 Cal. 339 57
Puterbaugh v. McCray, 25 Cal. App. 470 72

Ralston v. Bank of California, 112 Cal. 208 54
Rosenthal v. McMann, 93 Cal. 505 57
Ryder v. Bamberger, 172 Cal. 800 30

Scales v. Holje, 41 Cal. App. 734 32
Schainman v. Dean, 24 Fed. (2d) 475 37
Sexton v. Kessler & Co., 172 Fed. 535 63
Solomon v. Redona, 52 Cal. App. 306 89
Steele v. Marsicano, 102 Cal. 666 56
Stevens v. Boyes Hot Springs Co., 113 Cal. App. 479 54
Stewart v. Stewart Hotel Co, 33 Cal. App. 167 54

Tulley v. Tranor, 53 Cal. 274 ..... 82, 90

United States v. Bitter Root Development Co., 200 U. S. 457 42

Vadner, In re, 259 Fed. 638 33
Varner v. New Hampshire Savings Bank, 240 U. S. 617, 60 L. Ed. 829 26
Ventre v. Tiscornia, 23 Cal. App. 603 31

Western Union Tel. Co. v. Poe, 61 Fed. 449 85
Williams v. Ash, 111 Cal. 180 59
Williams, In re, 286 Fed. 138 31
Wright Motor Co., Inc., In re, 299 Fed. 106 43

Young v. New Pedrara Onyx Co., 48 Cal. App. 1 (28) ... 90

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF OF RESPONDENT AFTER WRIT OF CERTIORARI GRANTED.

THE PETITION SETS FORTH NO GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

In respondent's brief opposing petition for writ of certiorari, the point was made that the petition discloses no grounds justifying the issuance of the writ.

The petitioner urged in his petition that the decision of the Circuit Court of Appeals was in conflict with applicable decisions of the state and federal

Courts. This ground is now abandoned by the petitioner because it is not urged in his brief.

None of the questions urged in the brief bring the case within Rule 38, Subdivision 5, of this Court.

STATEMENT OF FACTS.

The bill of complaint attacks two pledges made by Henry Joseph Barceloux to the Peter Barceloux Company. One in writing dated April 27th, 1926, and the other by delivery of certain shares of stock on June 29th, 1926. The bill of complaint alleges the execution of the pledge agreement of April 27th, 1926, and a copy thereof is attached to the bill (Paragraph IV of Bill, R. 4).

The execution of this pledge agreement is admitted by the answer.

In the same paragraph it is alleged that pursuant to said agreement and at the time of the execution thereof, Barceloux purported to deposit with the corporation Certificate No. 5 evidencing 2499 shares of the capital stock of the corporation.

It is alleged that this was done with the intent to dispossess himself of the bulk of his properties and assets to prevent his nonkindred creditors from satisfying their respective claims; that the company entered into the transaction with notice of the intent of Barceloux to defraud such creditors.

The answer denies that the delivery was a purported one.

Under the pleadings and undisputed evidence, it is clearly established that the pledge agreement was executed on the 27th day of April, 1926, and Certificate No. 5 was delivered to the respondent on that date.

Paragraph V of the bill alleges that, on the 29th day of June, 1926, Henry Joseph Barceloux purported to deposit with the respondent certain certificates of stock therein described as additional security for the indebtedness due said corporation.

This pledge is also attacked on the ground of actual fraud on the part of the respondent and Henry Joseph Barceloux. It is alleged that it is made without consideration.

Paragraph VI of the bill of complaint alleges that on the 16th day of August, 1926, respondent held a sale for the payment and satisfaction of the purported obligations and indebtedness set forth in the pledge agreement "and also the following additional purported indebtedness or obligations" (R. 6).

Paragraph VIII of the bill attacks the sale on the ground that it was made without demand for the payment of the indebtedness and without any notice thereof and without bidders being present at such sale; that the price realized from said sale was grossly inadequate and that the sale was improvident; that respondent failed and refused to adjourn said sale, all with the intent to hinder, delay and defraud the nonkindred creditors of Henry Joseph Barceloux. The only other ground of attack being that the item of $1800.00 was not an obligation accruing or belong-

ing to the respondent, and on information and belief that no sum whatever was due to the company or secured by the pledges, or either of them, and that the attorney's fee was excessive.

It is to be noted that the regularity of the sale was only attacked on the grounds mentioned.

Paragraph X of the bill alleges that the defendant George R. Freeman, as administrator, claimed that the 2499 shares of the capital stock of the Peter Barceloux Company had been transferred and assigned to him as such administrator by way of security for the payment of a considerable sum of money due from Henry Joseph Barceloux (R. 9).

The bill also alleges "that an accounting is necessary to ascertain what moneys, if any, were at the time of said sale and now are due or owing to said George R. Freeman upon the security of said transfer and assignment."

And also "that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from the defendant Peter Barceloux Company the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all said shares of stock at the time of said sale" (R. 12).

The bill then prays for relief as follows:

First. That an inquiry and accounting be had and made as to the moneys, if any, due from Henry

Joseph Barceloux to Freeman, as administrator, on August 16th, 1926, and at the time of the filing of the complaint and secured by the assignment from Barceloux to Freeman;

Second. That an inquiry and decree be had and made as to the value of all of said stocks *on August 16th, 1926.*

Third. That the pledges of April 27th, 1926, and June 29th, 1926, be decreed fraudulent and void and that complainant have judgment against the respondent *for the value of all of said shares of stock at the time of the sale, to-wit: August 16th, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator, etc.*"

Fourth. That an inquiry and decree be had and made as to the respective rights and equities of the parties hereto and for general relief.

At this time we direct the attention of the Court to the fact that the petitioner and plaintiff was not awarded the judgment prayed for in the bill, to-wit: the value of all of said shares of stock "less such sum, if any, as may be found to be due or owing to George R. Freeman as administrator," but petitioner and plaintiff has been awarded a judgment not for the value of the stock on August 16th, 1926, but for the highest market value thereof between the dates of the pledges and the date of the Master's audit.

We will discuss this point in a subsequent portion of the brief.

It will be observed that the following facts stand admitted by the pleadings:

1. That a written pledge agreement was entered into between Barceloux and respondent on April 27th, 1926, and that the shares of stock included therein were delivered at the time of the execution of this agreement.

2. That the shares of stock referred to in paragraph V of the bill were delivered to the respondent on the 29th day of June, 1926, and were accepted by it (R. 6).

3. That the respondent held a sale on August 16th, 1926, at which the securities mentioned in the bill were sold "for the payment and satisfaction of the purported obligations and indebtedness set forth in said pledge agreement and attached hereto and marked Exhibit 'A,' and also the following additional purported indebtedness or obligations."

4. It is not denied that there was an indebtedness existing in favor of the respondent because it is alleged that the pledge was made "to secure certain preexisting indebtedness evinced by certain promissory notes in said agreement set forth" (R. 4).

The only question raised as to the amount of the preexisting indebtedness is the allegation that petitioner had no information or belief as to the amount secured.

The statement of facts contained in the petitioner's brief is incomplete.

The Peter Barceloux Company was a family corporation organized in 1912 by Peter Barceloux, who, with his wife, transferred certain real and personal property to the corporation in exchange for all of its

capital stock, except certain qualifying shares. One-fourth of the stock was issued to each of his children, Henry Barceloux, George Barceloux and Cora Gelinas, and one-fourth in trust for his nephews.

In the transfer to the corporation, Exhibit 8, not printed in the transcript, but filed with the Court as an original exhibit and appearing on page 26 of appellant's opening brief in the Circuit Court of Appeals, is found the reservation:

> "That the said parties of the first part reserve and except from such conveyance all of the rents, issues and profits and income from the said real and personal property as long as they or either of them may live."

Peter Barceloux continued in the active management of the corporation until his death, which occurred in 1918.

At the time of the trial of this action and the entry of judgment, Lumina Barceloux was still living.

At the trial the corporate books and records were introduced in evidence and are now before this Court. The corporation kept full and complete records and books of account showing all of its transactions from the date of its organization to the date of trial.

At the time of the organization of the corporation, it issued to Henry Joseph Barceloux Certificate No. 5 for 2499 shares.

Prior to April 27th, 1926, the date of the first transaction involved in this action, Henry Joseph Barceloux delivered Certificate No. 5 to his brother-in-law, who was acting for the corporation, as collateral

security for his indebtedness to the corporation and for any future indebtedness that might be incurred by him. No formal pledge agreement was executed at the time. It is undisputed that the stock remained in the possession of the secretary.

This pledge was established by the testimony of George and Henry Barceloux.

Certificate No. 5 introduced in evidence bears the endorsement that it is pledged to the Peter Barceloux Company as pledgee for Henry Joseph Barceloux as security for the payment of certain notes described therein and "as security for prior and future loans." This certificate is referred to in the question propounded to the witness Barceloux on page 307 of the transcript of record.

This certificate of stock shows an endorsement as of February, 1923 (R. 335).

This written endorsement on the certificate stands unimpeached by any evidence whatever, and is supported by the testimony of George and Henry Barceloux when called as witnesses by the petitioner.

The existence of this pledge is recognized by the allegations of the bill above mentioned.

The pleadings in no way attack the validity of the pledge made by delivery of the certificate prior to April 27th, 1926.

Under the undisputed evidence, from the date of the delivery of the shares of stock to either Peter Barceloux or the secretary of the company many years before the election of Henry Joseph Barceloux,

this certificate of stock was in the possession of the company and its officers other than Henry Joseph Barceloux.

Mr. Barceloux continued to increase his indebtedness with the corporation until 1926.

The pledge agreement of April, 1926, was not made because of any demand of Freeman for payment or security of the judgment. The company had a valid existing pledge by reason of the delivery and possession of the stock to secure an indebtedness due it. The agreement of April 27th, 1926, did not create any new indebtedness or any new obligation, but simply evidenced existing obligations.

This writing was sought for a number of reasons. It was primarily prompted by the fact that the minority stockholders, consisting of the three nephews, were dissatisfied with the situation and were demanding that some action be taken in connection with this loan (R. 310).

By the terms of the pledge agreement, the 2499 shares of stock were to stand as collateral security for the payment of a promissory note for $24,064.48 dated June 17th, 1925, a promissory note for $3500.00 dated February 6th, 1923, and a promissory note for $2000.00 dated April 27th, 1926. This agreement did not include all of the indebtedness due from Henry Joseph Barceloux at the time of its execution because the certificate was already held under the previous pledge. This is evidenced by the recital in the instrument "that any surplus after the payment of said notes, interest, commissions and expenses to be sub-

ject to my order, except that if said Peter Barceloux Company shall at the time of such sale hold any other of my obligations they may use such surplus toward the payment of any such obligations."

It also vested the corporation with power "to sell at any time after such notes or interest is due without notice or demand at the option of the said Peter Barceloux Company the whole or any part of said security either at public or private sale at their discretion and without notice or demand."

At this point we emphasize the proposition that this stock was only transferred as security, and the surplus remaining after the payment of the notes was expressly reserved to the pledgor.

The fact that the company only asked for and accepted security instead of asking for a transfer of the stock in satisfaction of the debt clearly negatives any idea of any attempt to put the property beyond the reach of either Freeman or any other creditor of Barceloux.

After the execution of these pledges, Barceloux resigned as president and director and sold his qualifying share to Mrs. Gelinas. This is consistent with the transaction whereby he had pledged his stock to the company. Being indebted and because of the dissatisfaction with his management it was logical that he should surrender his management of the corporation.

On August 5th, 1926, the corporation adopted a resolution directing the sale of the property not only to satisfy the specific indebtedness mentioned in the pledge agreement, but to satisfy the indebtedness

created previously, and for which the corporation held the certificate of stock as collateral under the original arrangement between Henry Joseph Barceloux and his father, who was in charge of the corporation.

These steps were all taken in regular order and the whole transaction is set forth in detail in the minutes of the corporation (Plaintiff's Exhibit 5).

The corporation recognizing that, it held the stock as collateral for previous loans, and that there was no waiver of notice or demand under the original arrangement with the father, followed the legal requirement of serving notice and demand before making the sale. The notice of sale recited that Barceloux had pledged to the company the security for the payment of $35,814.41 which included all of the indebtedness due at that time. The sale was not based alone on the pledge created by the written agreement, but on all of the pledges made to the corporation.

Inasmuch as this action only involves the validity of the transfers of April 27th, 1926, and June 29th, 1926, it must fail because under the pledge sale the Peter Barceloux Company acquired the legal title under the former pledge which is not in any way involved in this proceeding or judgment herein.

No attack was made on the legality of this last pledge until the filing of this action on April 3rd, 1928.

During all of this period of time Henry Joseph Barceloux was a man of large affairs, owning real and personal property, the president of a bank, and

was regarded as entirely solvent by all parties, including Mr. Freeman, who, after a thorough investigation of his affairs, concluded that he was solvent.

On page 412 of the record he testifies "at the time I made the investigation of the assets and liabilities of Henry Barceloux and taking his values, I could not conclude other than that he was solvent and I so concluded. I did not have any knowledge of all these other things that appeared subsequently in the bankruptcy proceedings."

This last statement is of no force because nothing affecting the properties or the value thereof, or the amount of his indebtedness at the date of this transaction and not known to Mr. Freeman at that time, was subsequently disclosed in the bankruptcy proceeding.

Mr. Henry Joseph Barceloux testified on page 327 of the transcript of record "that at the time I made this payment to the Peter Barceloux Company about July, 1926, none of my creditors were endeavoring to collect any of the debts which I owed them." The word "payment" is apparently an error, and should be "pledge." The condition of his affairs is fully set forth on pages 372 and 373 of the transcript of record. On page 421 of the record he testified that he was operating an insurance and real estate business in Willows and that the general revenue derived during the year was approximately $12,000.00.

The circumstances leading up to the execution of the pledge agreement of April 27th, 1926, are covered by the testimony of George and Henry Joseph Bar-

celoux, called as witnesses for the petitioner, and is not disputed.

There was some dissatisfaction over the fact that the cash account was diminishing rapidly, and Henry Joseph Barceloux asked the corporation to advance him $3,000.00 to pay Mr. Freeman (R. 304).

A request for the execution of a pledge agreement was made sixty days before the execution thereof (R. 304).

George Barceloux testified that the company had been insisting on Henry making a pledge agreement because all the corporation had prior to April 27th, 1926, was the possession of the certificate of stock, and the pledge agreement was requested because "we just wanted it more explicit—well, stipulating what security was up and stipulating what security we had."

At that time the officers of the company knew that Mr. Freeman and Henry Joseph Barceloux were co-operating for the purpose of collecting the judgment from Mr. Donohoe.

We now come to a consideration of the relations existing between Mr. Freeman and Henry Joseph Barceloux as bearing on the issue of fraud.

Frank Freeman filed an action against Henry Joseph Barceloux and Charles L. Donohoe for an accounting on a partnership existing between them in May, 1914. Judgment was entered in favor of Freeman on July 25th, 1921. An appeal was taken. The judgment was affirmed and the remittitur filed on

February 26th, 1924. The judgment was stayed on appeal without bond.

Freeman v. Donohoe, 180 Cal. 170.

Henry Joseph Barceloux did not at any time from the filing of the action in 1914 make any effort to conceal or dispose of his property, or in any other way to avoid the payment of the judgment.

After the filing of the remittitur, Charles L. Donohoe was adjudged a bankrupt.

Mr. Freeman testified that on the affirmance of the judgment, Mr. Barceloux and his attorney stated to him that it was Barceloux's full intention to pay the judgment but wanted his assistance in running down Donohoe to make him pay his half. It was agreed that Barceloux would make substantial payments from time to time on his judgment (R. 401).

Mr. Freeman testified "that agreement was kept and the payments that are outlined in my answer here were made on that judgment."

Other steps were taken by Freeman and Barceloux to realize additional payments on the judgment.

Mr. Freeman also testified "we maintained that agreement in force until the month of June, 1926, at which time I told Barceloux that I could not any longer go along without additional security on that judgment. I already had a judgment lien on the ranch in Lake County." "I asked him to give me a trust deed on that property" (Transcript of Record 413).

Mr. Freeman does not claim that at this time he had no knowledge of the indebtedness and the pledge of the stock to the Peter Barceloux Company. He testified at page 401 of the transcript of record that he knew that the company had his stock as collateral for a loan or note of about $24,000.00. Mr. Freeman had been furnished with a statement showing an indebtedness in about this amount.

Mr. Barceloux testified that commencing with the affirmance of the judgment and until some time in 1926, Mr. Freeman had direct knowledge of all of his properties and assets and that he had kept nothing from him; that he knew everything (R. 372).

Also that on numerous occasions while they were negotiating for the assignment of his interest in the Peter Barceloux Company stock he told Mr. Freeman that he owed the Peter Barceloux Company a considerable sum of money (R. 374).

This is also corroborated by the testimony of Mr. Freeman that his reason for not placing the amount of the indebtedness from Barceloux to the Peter Barceloux Company in the receipt which he was asking the Peter Barceloux Company to sign was probably because of his communication with Mr. Ware about the whole matter, and there was something else to be considered. He testified "I think probably there were other obligations which he owed the Peter Barceloux Company which were to go in the notice of assignment and I understood that" (R. 412).

This conclusively disproves the assertion that Mr. Freeman was acting under the impression that the

total indebtedness of Henry Barceloux to the Peter Barceloux Company did not exceed $24,000.00.

Mr. Freeman also testified that he knew generally what the Peter Barceloux Company assets were (R. 416).

On cross-examination he repeated the statement that the amount of the assignment was left blank because he expected that the true amount of their indebtedness would be inserted in the document (R. 410).

This is further emphasized by the letter of Messrs. Ware & Ware addressed to Mr. Freeman on July 2nd, 1926, in which they stated "the amount of the advances not evidenced by notes of H. J. Barceloux we were unable to supply due to the fact that Mr. George Barceloux stated that it would take some little figuring to ascertain the amount as of the date of the certificate of the secretary. We told him to ascertain that amount and fill it in in the blank for that purpose."

In the face of this testimony it cannot be seriously contended that Mr. Freeman acted on the assumption that the indebtedness due the respondent was a note for $24,000.00.

In June, 1926, Mr. Freeman requested Henry Joseph Barceloux to give him a trust deed on the Lake County property as cumulative security, although his judgment was at that time a lien on that property. This request was made, as he testifies, so that he could make the sale to satisfy his demand under a trust deed rather than the judgment (R. 401).

Henry Joseph Barceloux furnished Mr. Freeman with a complete statement of his assets and liabilities as of June 24, 1926, so that Mr. Freeman, after investigation, could select therefrom properties to be turned over to him as additional security (R. 411).

It must be borne in mind that all of the parties involved in this transaction were on amicable terms, and that Mr. Freeman was undoubtedly familiar with all of the affairs of Henry Joseph Barceloux.

There is no testimony that the statement of assets and liabilities was incorrect.

He went to the various banks which held the stocks as collateral to ascertain the amount of the indebtedness against them. Mr. Freeman testified, "I told him I did not want those things anyhow because of the fact that they were hypothecated for large amounts, but I would prefer to have the Peter Barceloux Company stock" (R. 402).

We have already referred to his testimony that, after making a complete investigation of the assets and liabilities of Barceloux and taking his values, "I could not conclude other than that he was solvent and I so concluded". His statement that he did not have any knowledge of any of those things that appeared subsequently in the bankruptcy proceeding is of no significance, because nothing appeared in the bankruptcy proceeding showing any inaccuracy in the statement furnished by Barceloux.

Mr. Freeman was undoubtedly as familiar with the values of the property as Mr. Barceloux, and it cannot be fairly assumed that Mr. Freeman would act on

a value fixed by Mr. Barceloux, unless he was satisfied because of his knowledge of properties and the investigation he made before acting.

Can it be contended that Mr. Barceloux is to be treated as solvent for the purpose of sustaining the Freeman assignment, and as insolvent for the purpose of defeating the Barceloux pledge, when, it is neither asserted nor proven, that there was any difference in the condition of his property and the value thereof at the date of the pledges in question and at the date of the Freeman assignment (R. 412).

An effort is made to give the impression that Barceloux did not keep faith with Freeman in endeavoring to collect the Donohoe judgment, but Mr. Freeman testifies that such is not the fact (R. 413).

He testifies further that "during all of these times as far as I knew I was the only creditor of Henry Barceloux that was acting at all in endeavoring to collect anything against him". Also that "all of the time I was cooperating with Henry in an effort to collect my judgment as best I could" (R. 614).

Upon the completion of the investigation by Mr. Freeman and at his request, Henry Joseph Barceloux executed an assignment of the Peter Barceloux Company stock to Mr. Freeman, which assignment expressly provides that it is subject to the pledges of the Peter Barceloux Company now questioned in this action.

The only point on which the parties did not agree, was the request of Mr. Freeman that the company should execute to him a writing whereby it would give

him notice of the sale of the property under the pledge, and agreeing that it would not foreclose the pledge against the property without giving him at least ninety days' notice.

Acting within its legal rights the company refused to agree to defer the sale of the pledged property for ninety days. The refusal did not result in any controversy between the parties.

On June 30th, 1926, Mr. Freeman served on the respondent a notice that the stock had been transferred to him and attached the following to the notice:

> "As Secretary of the above mentioned Peter Barceloux Company I acknowledge receipt of the above notice and certify that such Company has no notice of any lien or charge affecting the stock referred to in said notice, other than a lien in favor of said Company for the sum of $.....
>
> .....
>
> Secretary of Peter Barceloux Company, a corporation."

During the period of time covered by the transactions pertaining to the pledge of April 27th, 1926, Mr. Freeman was investigating the affairs of Henry Joseph Barceloux. Among his properties was the Aden Ranch in Lake County, California, which according to the testimony of George Barceloux was purchased in 1917 for $58,000.00 and thereafter extensively improved. (R. 344).

Henry Joseph Barceloux testified that in his opinion the ranch was worth $125,000.00, subject to a mortgage of $30,000.00.

Mr. Freeman testified that he was familiar with the ranch and made an investigation of its market value, and from such investigation concluded that the value was $60,000.00 or $65,000.00.

At Mr. Freeman's request, Mr. Barceloux executed and delivered to him a deed of trust on this property to secure the payment of his judgment.

Mr. Barceloux offered Mr. Freeman as security the Pacific National stock, the Glenn County Garage stock, and bank stock, but Mr. Freeman declined that offer (R. 375).

This testimony of Mr. Barceloux was not disputed by Mr. Freeman.

The pledge of these stocks on June 29th, 1926, was made after Mr. Freeman had made his selection of securities.

As a result of these various transactions, Henry Joseph Barceloux's two principal creditors, the Peter Barceloux Company and George R. Freeman, were satisfied. As Mr. Freeman expressed it on the witness stand, "I took the assignment of contract upon the Lake County ranch and to the Peter Barceloux Company stock at the same time because I wanted ample security for this obligation" (R. 416).

Mr. Freeman fully understood that the corporation was standing on its rights as pledgee because it refused to enter into an agreement whereby it would be bound to give him ninety days notice, before exercising its right of sale under the pledge agreements.

There was no interruption in the amicable relations of all of the parties involved in these transactions and

Mr. Freeman and Mr. Barceloux continued to cooperate together. In fact, Mr. Freeman was acting as attorney for Mr. Barceloux in some matters.

He testifies that he did not receive any notice of sale under the pledge agreement and states "my first actual knowledge of the sale of said stock was in the month of September, of the year 1926" (R. 410).

Even, after learning of the sale of the stock in September, 1926, no question was raised by Mr. Freeman in connection with the pledges. The filing of this action was the first attack made on these pledges. In November, 1926, Mr. Freeman issued an execution on the judgment and levied on all of the properties of Henry Joseph Barceloux (R. 375). The bankruptcy proceedings followed.

The entire course of conduct of Mr. Freeman conclusively establishes, that he had full and complete knowledge of the pledges, and that they were not regarded as being a violation of any agreement between himself and Henry Joseph Barceloux.

Beginning on page 10 of petitioner's brief certain transactions are discussed on the theory that they are an indication of a plan to defeat the creditors of Barceloux.

The first and complete answer to these discussions is that the Peter Barceloux Company was in no way connected with any of the transactions mentioned. All of them occurred after the execution of the pledges to the respondent and the deed of trust and assignment to Mr. Freeman.

These pledges cannot be invalidated without the finding of an actual fraudulent intent on the part of the respondent.

It requires no argument to demonstrate the proposition that the acts of the bankrupt with third persons and with which the respondent had no connection whatever, subsequent to the execution and delivery of the pledges, are not evidence of any fraud against the respondent. It would be just as logical to attempt to connect Mr. Freeman with these transactions. However, neither he nor the company had anything to do with them.

There is no charge of any conspiracy on the part of the company and Henry Joseph Barceloux to defeat his creditors.

For these reasons, these transactions have no place in the case, and unquestionably cannot be used as evidence against the respondent.

Aside from the foregoing, it must be remembered that all of them took place after Barceloux had entirely satisfied the demands of his two principal creditors.

The first transaction referred to is a conveyance from the bankrupt to his wife on July 7th, 1926, of his equity in some lands stated in the brief to be of the value of $2900.00. There is no evidence sustaining this valuation. On the contrary, the undisputed testimony of Mr. Barceloux shows that he figured the value to be $1,000.00; that the contract, to say the least, was of questionable value. As he expressed it, his interest was very remote, and as it turned out nothing was

received on account of his contracts with Mr. Neilson. It is undisputed that his wife gave him a check for $1,000.00 for his interest; that it was necessary for him to secure the $1,000.00 to pay interest and a power bill. She lost $80.00 on the deal (R. 355-370).

The next transaction mentioned on page 10 of the brief relates to the sale of his qualifying share as a director of the Peter Barceloux Company for $10.00. There is nothing unusual in this transfer, as he was retiring as a director of the corporation. The statement that the Peter Barceloux Company took securities for more than three times the value of its indebtedness is hardly consistent with the claim of petitioner that Mr. Barceloux was bankrupt at the time of the pledge. This is particularly true, when Mr. Freeman admits in his testimony that the value of the Lake County ranch was $35,000.00 in excess of the mortgage.

On page 11 of the brief the attention of the Court is directed to a transaction between the bankrupt and Mrs. Gelinas whereby Mrs. Gelinas took over certain bank shares subject to an indebtedness.

The statement in the brief is incomplete and misleading. The Court will note that this transaction was on August 24th, 1926, after Mr. Barceloux had satisfied both Freeman and the corporation. He was indebted to two banks which were threatening to foreclose his collateral. He asked his sister, Mrs. Gelinas, to take over the loan. She did so. The indebtedness on this stock was $13,800.00. She paid Mr. Barceloux $2000.00 in cash. In addition thereto, she was compelled to give the bank more collateral

to prevent a foreclosure against the securities (R. 390-393).

It is quite surprising that this should be mentioned as an indication of fraud on the part of the bankrupt in view of the testimony of Mr. Freeman, that he had been furnished with a statement of this loan and the security by the bankrupt and refused to accept it, after making a personal investigation to ascertain the conditions existing at the two banks (R. 402-411).

Mention is also made in petitioner's brief on page 11 of a transaction whereby the Peter Barceloux Company assumed the debts of the bankrupt in the amount of $16,000.00 owing to the Crocker National Bank. The same condition exists with reference to this loan.

Mr. Freeman testifies on page 411 of the transcript that Mr. Barceloux authorized Mr. Freeman's representative to go to the Crocker bank and get a proper statement, and that he knew that Barceloux owed this $16,000.00 which was secured by bank stock (R. 411-412). The reason the company took over this loan is explained by Mr. George Barceloux on page 196 of the record. The company was borrowing money from the Crocker National Bank, and in order to maintain its credit took over this loan at the suggestion of that bank. The company made a loss of $16,000.00 on the transaction (R. 196, 197, 206, 207, 377). This transaction is uncontradicted.

The reference on page 12 to the transfer of certain personal property to the attorney was long after the pledge to the respondent and in no way connected therewith. It was also after Mr. Freeman had levied

his execution. His financial condition at this time was entirely different from that when he made the pledges to the respondent, and the assignment and deed of trust to Mr. Freeman.

At this point we wish to refer to the statement in the dissenting opinion that Certificate No. 12 bears a feigned date and must have been antedated so as to place it before June 30th, 1926 (R. 469).

Certificate No. 12 was not in existence at the date of the pledge.

As alleged in the complaint (R. 4), Certificate No. 5, which was issued to Henry Joseph Barceloux at the time the company was incorporated, is the certificate that was included in this pledge.

Certificate No. 12 was subsequently issued.

Again this Certificate No. 12 is referred to in the letter from Ware & Ware to Mr. Freeman (R. 406).

There is no allegation in the pleadings and no evidence that this certificate was not issued on the day it bears date. No such question was raised in the trial Court. No such question was raised by the pleadings. Mr. Freeman never questioned it. Furthermore, there was no reason to antedate this certificate because as is admitted by the pleadings and proof, Certificate No. 5 was transferred by the pledge agreement of April 27th.

We have already referred to the testimony of Mr. George A. Barceloux that he had heard of the negotiations between his brother and Mr. Freeman before the execution of the deed of trust and assignment to Mr. Freeman.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING OF THE CIRCUIT COURT OF APPEALS THAT THERE WAS NO FRAUD, AND IS WHOLLY INSUFFICIENT TO SUSTAIN THE FINDING OF FRAUD MADE BY THE TRIAL COURT.

In *Varner v. New Hampshire Savings Bank,* 240 U. S. 617, 60 L. Ed. 829, this Court held that even where there is a sharp dispute in the testimony, if the evidence sustains the conclusions reached by the Circuit Court of Appeals, the judgment entered there will be affirmed.

Section 3432 of the *Civil Code of California* provides that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another".

> "It is only where the transfer was made with intent to delay or defraud any creditor that it can be attacked".
>
> *Civil Code,* Section 3439.

In *Heath v. Wilson,* 139 Cal. 366, it is held that these provisions of the Civil Code do not affect the power of a person, although insolvent, to transfer property in this state, in good faith to a particular creditor, for the purpose of paying or securing the whole or a part of the debt owing to such creditor.

Dana v. Stanford, 10 Cal. 278, is cited with approval.

Justice Field declares in that case, that from the very power which a man possesses over his own property, it follows that he can dispossess himself of it in any manner he may see fit which does not

contravene the general policy of the law; that it is no part of such policy to inhibit its application to the payment of one debt rather than another; also, that a conveyance giving such preference is not fraudulent, though the debtor may be insolvent, and the creditor be aware at the time, that it will have the effect of defeating the collection of other debts; that a creditor violates no rule of law when he takes payment or security for his demand though others are thereby deprived of obtaining satisfaction for their equally meritorious claims.

In response to the suggestion that because the corporation was unable to pay its debts as they became due, it was insolvent, the Court in the *Heath* case holds that such fact alone does not make the sale fraudulent, nor raise a presumption of fraudulent intent.

We quote the following from *McKee v. Title Insurance, etc. Co.*, 159 Cal. 217, in answer to the point that the value of the securities exceeds the amount of the indebtedness:

> "In every case where a person who is indebted borrows less money than the sum of all his debts and secures the lender by a first mortgage on all his property, the lender intends to hinder and delay the other creditors so far as may be necessary to make his mortgage a first lien. But such hindrance and delay is legitimate and lawful and does not constitute fraud."

Throughout the brief of petitioner the testimony of Henry and George Barceloux and Mrs. Gelinas is relied upon where it suits the purposes of peti-

tioner, while in other portions of the brief it is argued that their testimony is to be rejected.

To sustain the allegations of fraud, petitioner called these parties as his witnesses. The only other witness called was Mr. Freeman.

Section 2055 of the *Code of Civil Procedure* of the State of California, providing that a party calling and examining as a witness an adverse party shall not be bound by his testimony, does not mean that such testimony may not be given its proper weight, but simply as it declares, that the party calling such witness shall not be precluded from rebutting his testimony, or from impeaching the witness. In other words, such testimony is to be treated as though given on cross-examination.

This was also decided in *Figari v. Olcese,* 184 Cal. 775, on the authority of the decision of this Court in *Dravo v. Fabel,* 132 U. S. 487.

The testimony of these witnesses stands uncontradicted and unimpeached. In fact the trial Court did not disregard the testimony, but accepted it as true, and then deduced the inference of fraud. There is no conflict between the testimony of Mr. Freeman and the other parties on any material point. Mr. Freeman and Mr. Barceloux only differed as to whether Freeman was informed that the indebtedness to the respondent was $24,000.00.

In view of the fact that one of the notes was for $24,000.00, there may have been some confusion on the subject. However, from the testimony we have heretofore mentioned, it is clear that Mr. Freeman

knew that there were obligations other than the $24,000.00, because he left the amount of the indebtedness blank in the document prepared by him and to be executed by the respondent.

If we disregard the testimony of every witness except Mr. Freeman, there is no evidence to sustain a finding of fraud.

It is undisputed that the pledges were made for a valuable consideration.

Without the testimony of George and Henry Barceloux and Mrs. Gelinas, the record would consist of the testimony of Mr. Freeman and the documentary evidence.

The burden of proof is, of course, on the petitioner.

Nothing in Mr. Freeman's testimony deals with the transaction between Barceloux and the company.

We would then have the situation of writings, unimpeached. The presumption of consideration and fair dealing would require a judgment in favor of the respondent in the absence of testimony to the contrary.

We agree with the following statement quoted from page 67 of the petitioner's brief:

> "There is no conflict in the facts or the sequence of the various transactions between the bankrupt and the respondent company, but the only conflict, if any, is in the inferences that may be deduced from these facts".

Under the authorities, this is a concession that the evidence is insufficient to sustain the finding of the

trial Court, much less to upset the finding of the Circuit Court of Appeals.

This is not the case of witnesses contradicting one another. The witnesses agree as to what was done. As stated by petitioner, it is a question of whether or not the Court is justified in drawing an inference of fraud from the acts of the parties.

With the record in this state, it was the express duty of the Court to draw the inference of fair dealing.

In *Ryder v. Bamberger,* 172 Cal. 800, an action for fraud, plaintiff appealed from a judgment in favor of the defendant asserting that the evidence was insufficient to sustain the finding in favor of defendant.

Petitioner admitted that the question was one of inferences to be drawn from the testimony. In upholding the trial Court, the Supreme Court of California very tersely stated the rule in the following language:

> "For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the Court or jury to draw the inference favorable to fair dealing".

Also,

> "For fraud must always be proved so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by

> a preponderance of the evidence, and it becomes the duty of Court or jury, as has been said, to find in favor of innocence and uprightness".
>
> *In re: Williams,* 286 Fed. 138.

All of the facts relied upon were of an open and notorious character, consisting of writings and transactions had with the knowledge of all the parties in interest. The failure of plaintiff to produce any evidence contrary thereto, must be taken as confirmatory of the testimony of the witnesses.

Ventre v. Tiscornia, 23 Cal. App. 603;
Entwisle v. Seidt, 155 Fed. 864.

The same rule is followed in the federal Courts.

In re: Brown, 199 Fed. 356;
In re: Hawks, 204 Fed. 310.

THE CIRCUIT COURT DID NOT ERRONEOUSLY CONSTRUE SECTION 70e OF THE BANKRUPTCY ACT; NEITHER IS A MONEY DECREE FOR THE VALUE OF THE PROPERTY THE ONLY OR PROPER RELIEF.

In support of the contention that the Circuit Court of Appeals erroneously construed Section 70e, petitioner has quoted an excerpt from the decree on page 18 of the brief, reading as follows:

> "The trustee in bankruptcy acting for the creditors has no right of election".

This statement must be considered with reference to the subject under discussion by the Circuit Court.

Beginning at page 460 of the record, the opinion takes up a discussion of the authority to enforce the rights of creditors under Section 70e.

In accordance with the uniform weight of authority, this section simply authorizes the trustee to enforce the rights of creditors in accordance with the laws of the state applicable to the transaction.

The transfer having been made more than four months prior to bankruptcy, this section, as construed by this Court, gives the trustee in bankruptcy a right of action to recover property transferred in violation of the state law.

The Circuit Court of Appeals then considers the law of the State of California with reference to the right of a creditor to attack a conveyance on the grounds of actual fraud under Section 3439 of the *California Civil Code.* As the Circuit Court of Appeals stated, the question for consideration is "whether or not it is proper to enter a judgment for the value of the property transferred where that property is subject to the jurisdiction of the Court".

It is unnecessary to review the cases cited in the opinion.

The remedy of this trustee is the same as that of a creditor under the California law.

The subject is thoroughly discussed in the case of *Scales v. Holje,* 41 Cal. App. 734, from which we take the following quotation:

> "The plaintiff as trustee in bankruptcy is in no better legal position than the creditors whom he represents. There is no claim made that any of the money was paid to Holje within four months of the bankruptcy. 'When the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred

> as a concomitant to the due operation of the system, but exclusively in the creditors' common law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. *Such as no creditor could have avoided, he cannot avoid'.*"

While the bankruptcy act clothes the trustee with authority to maintain the action, still his cause of action is not covered by the bankruptcy statute, nor the federal laws, but by the state law. The language of Section 70e that "a trustee may avoid any transfer by a bankrupt of his property which any creditor of such bankrupt might have avoided" means "which any creditor might have avoided" under the laws of the state where the transaction occurred.

Manders v. Wilson, 230 Fed. 536.

Suits for the recovery of property fraudulently conveyed by the bankrupt are not proceedings in bankruptcy, but controversies at law or in equity.

In re: Vadner, 259 Fed. 638.

The right of a trustee in bankruptcy to avoid a fraudulent transfer depends upon the law of the state in which the property is located.

McMullen v. Zabawski, 283 Fed. 552.

The Circuit Court of Appeals simply defined the right of action possessed by the trustee under the state law.

The cases cited in the opinion and in this brief conclusively show that under the law of California, the remedy is the return of the property where it is

available, and that a personal judgment was not necessary or justified. In other words, full and complete relief can be given to the plaintiff by the return of the certificates of stock in question, and requiring respondent to account for any dividends or profits derived from them.

The respondent has received nothing by reason of this transaction, except the certificates of stock, leaving out of consideration the few shares sold. No other money has come into its hands.

By this judgment, the petitioner's recovery is not confined to the value of the stock at the time of the transfer, but its highest value between the date of the transfer and the audit. It would seem to require no argument to demonstrate that in a Court of Equity the plaintiff will not be permitted to profit by the litigation. He should have no greater rights than the bankrupt.

The judgment in this and the companion case of Gelinas, if collected, will exceed all of the indebtedness of the bankrupt and leave a balance in his favor.

The situation is somewhat analogous to that presented in the case of *Off v. Hakes,* 142 Fed. 364. In that case a merchant sold his stock of goods within four months before the commencement of proceedings in bankruptcy. The purchaser assumed the indebtedness of the retiring firm and as part of the purchase price gave his note for $964.52. This note was turned over to a creditor of the merchant. An action was filed to recover the amount of the note as an alleged preference. The trustee was awarded a decree for the

money. It was reversed, because under equitable principles, the petitioner not having been paid the amount of the note constituting the alleged preference, the equitable remedy was to direct the surrender of the note, and not judgment for its assumed value.

The plaintiff, having invoked the power of a Court of Equity to assist him in subjecting his property to the debt, cannot complain if he is given the right to satisfy their claims from the property fraudulently transferred.

Upon the subject of the election, the Court holds "The substitution of the value of the property for the property itself is not a right of the plaintiff unless and until it is determined that the property itself cannot be subjected to his claim, in which event a Court of Equity will remedy the defect so far as may be done by substituting for the property a judgment for its value" (R. 464).

Following this quotation is the paragraph from which the petitioner excerpts the statement that the trustee has no right of election.

The Court was considering the right of an owner of property to bring an action for its conversion under the laws of California. It is then pointed out that a trustee in bankruptcy acting for the creditors has no such right of election. This statement must be taken in connection with the California authorities, that in an action in equity to decree a fraudulent conveyance void, equity will direct the return of the property unless it has been sold, unless that kind of relief is rendered impracticable by the defendant.

As stated by the Circuit Court of Appeals, the cases cited by both parties in that Court are in accord with its decision.

The rule is correctly stated in the quotation from *Connecticut Fire Ins. Co. v. McNeil,* 35 Fed. (2d) 675, cited by petitioner in the Circuit Court and reading as follows:

> "If a court of equity obtains jurisdiction of a suit *for the purpose of granting some distinctively equitable relief* * * * and it appears from the facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, * * * that the plaintiff was entitled to the only alternative relief possible of damages, the court there may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages" (italics ours).

Assuming for the sake of the argument that the title was vested in George A. Barceloux at the time of the filing of the complaint, still it appears by the allegations of the bill of complaint that he purchased the property with notice of the fraud.

Under this theory of the case, petitioner was entitled to maintain an action against George A. Barceloux, as well as the corporation for the recovery of the stock.

The decree therefore cannot be justified by the above rule because the facts were known to the petitioner at the time of the filing of the complaint and

were not first disclosed at the trial, and the Court can grant full and complete relief without resort to the alternative remedy of damages.

In this case we have the amazing situation of a judgment of $106,582.59, the highest value of the property between the dates mentioned, based on a bill alleging the value to be $82,100.00, and praying for judgment for so much thereof as exceeds the claim of the former defendant Freeman under his assignment.

We repeat, that the trustee in his bill recognizes the validity of the assignment made to Freeman under the same surrounding circumstances, and asks for judgment for the value of the stock, less the amount due Freeman. He has recovered the highest market value of the stock. To say that such a judgment can stand in a Court of Equity is to disregard every principle of equity and fair dealing.

An effort is made to sustain this judgment by citing the cases of *Schainman v. Dean,* 24 Fed. (2d) 475; *Brainard v. Cohn,* 8 Fed. (2d) 13; and *Oliver v. Brennan,* 299 Fed. 106, on page 19 of the petitioner's brief.

Schainman v. Dean simply declares the general rule that a trustee may sue either in law or in equity, but does not hold that Section 70e in any way limits or controls the rules governing equitable relief.

The petitioner having sued in equity is entitled to such relief as is usually administered by a Court of Equity and no more.

In *Oliver v. Brennan,* the only proposition involved was that the decree was too uncertain and indefinite.

In *Brainard v. Cohn,* the trustee sought a money judgment because the property had been mixed and confused beyond possible identity with the properties of the defendant. This is in recognition of the rule that it is distinctly alleged and proven that the property was not available by reason of such confusion.

Counsel are in error in arguing that the right of the trustee depends solely upon the bankruptcy act (Brief page 20).

As we have shown, the right of the trustee is that of a creditor under the law of the state.

It has not been contended that the recovery of the trustee is limited to the right of a single creditor. The rule is, that the trustee in an action to invalidate a transaction made more than four months prior to bankruptcy, has the same rights as a creditor or creditors under the state law. The trustee has no greater or additional rights.

It is well settled that in an action of this kind, to set aside a transfer on the ground of fraud, equity will direct the return of the property if available, and if not the value thereof.

The Bankruptcy Act does not attempt to define the rights of a trustee or creditor under the state law. That he is exercising the right of a creditor is further recognized by the fact that the state and federal Courts have concurrent jurisdiction of such action.

There is no suggestion as argued on page 23 of the petitioner's brief that a Court of Equity can do nothing more than to decree the title vested in the bankrupt, and that two actions would be necessary.

The remedy is not the choice of the transferee, but rests wholly with the Court.

The logical effect of the argument of petitioner, is, that a trustee in bankruptcy has the right to limit and control the remedy to be administered by a Court of Equity.

Aside from the foregoing, this trustee having elected to file his bill in equity, the relief is unquestionably controlled by the well settled principles of equitable relief.

This question was before this Court in *Dunphy v. Kleinschmith,* 78 U. S. 610; 11 Wall. 610. That was a creditor's bill to set aside a fraudulent mortgage. The bill prayed that the mortgage be declared void and a receiver appointed to dispose of the property and satisfy the claims of the creditors. Plaintiff was awarded a money judgment in the sum of $35,737.00. The case was reversed on the ground that it was a case of chancery jurisdiction and one requiring equitable, as distinguished from legal relief. We quote the following from the opinion:

> "Again, in an equitable proceeding of this kind a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have taken a fraudulent assignment of the property. The decree against him must be a *decree* for an account. He must be called to account for just what property has

come into his hands, and no more; and he will be entitled, under ordinary circumstances, to a rebate for the amount that was justly and honestly his due. The mode of taking such an account is well known in equity proceedings. The defendant is to exhibit an account either in his answer or in the master's office, and if it is not satisfactory to the complainant, it may be surcharged or falsified, and as the account is finally found to stand, so will the responsibility of the defendant be. But if the complainant wishes to make him answerable in damages, either for the waste of the property or for its disposal by the original proprietor by aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

No account of the kind, or in the manner indicated, seems to have been taken at all. The suit was tried like an action for damages, and the jury were left to say, in brief, whether or not the complainants could have made their money on execution had it not been for the mortgage and assignment to the defendant. The jury answered that they could, and the defendant was made personally liable for the whole amount."

Dunphy v. Kleinschmith was overruled, as to the point decided with reference to the practice of federal and territorial Courts in *Hornbuckle v. Toombs,* 85 U. S. 648, but not on the question of equity jurisdiction.

The Hornbuckle decision declares the familiar rule that the laws regulating the proceedings of the United States Courts are of specific application and locally inapplicable to the Courts of the territory.

If, as argued by petitioner, the property was sold and ownership was not in the corporation, then the remedy was an action at law for damages and not in equity.

In *Dunphy v. Kleinschmith* the property had been transferred and it was found in the possession of Dunphy under a common assignment which prima facie gave him the legal title. It is charged that this was a fraudulent contrivance to hinder and delay the creditors. Being an equitable proceeding, and the property being in the hands of the defendant, it was held that money damages could not be awarded.

It appearing by the allegations of the complaint, that George A. Barceloux was a participant in the fraud, he was not a bona fide holder and it inevitably follows that the plaintiff's remedy was to elect either to sue at law for damages, or to sue in equity for the recovery of the property from the respondent or George A. Barceloux, its vendee.

In equity, the defendant must be called to account for the property that has come into his hands and no more. If the complainant wishes to make him answerable in damages either for the waste of the property or for its disposal by the original proprietor, he must sue for damages in an action at law.

The petitioner failed to establish a case in equity. There can be no jurisdiction on the theory of accounting because there were no accounts between the parties. The only suggestion of the necessity for an accounting is to ascertain the value of the shares of stock. This could be done in an action at law.

Appellee having affirmed the transaction and sought recovery of damages, his cause of action is one arising in tort and cannot be converted into one for accounting.

United States v. Bitter Root Development Co., 200 U. S. 457.

If the fraudulent grantee has concealed or disposed of the property conveyed to him, or mingled it with his own property in such a manner that the creditors cannot reach or identify it, a decree may be rendered against him for its proceeds or value.

27 *Corpus Juris,* 855.

Bearing in mind that the distinction between equity and law in federal Courts is jurisdictional, the point is, that a Court of Equity has no jurisdiction to render judgment for damages, except under the conditions stated, but should require defendant to account for the property received. There is no question as to the ability of the respondent to return this stock, or of the power of the Court to direct its return and to require an accounting, as prayed for in the bill.

There can be no question as to the soundness of the opinion of the Circuit Court of Appeals that the petitioner cannot complain, if he is given the right to satisfy his claims, from the property fraudulently transferred, but petitioner is asking more than this. The property is in the possession of the respondent who has received no money thereon.

Instead of receiving that which the respondent received, the petitioner is given a money judgment not

for the value of the property at the time of the pledges but for its highest market value.

It is therefore clear, that in so holding, the Court has not placed any limitation on the power of the trustee to elect.

The opinion deals with the question of the relief to be granted to the trustee after he has elected and filed a bill in equity.

In the dissenting opinion it is stated that no seasonable objection as to the jurisdictional facts was made (R. 466).

We respectfully call attention to the fact that on the filing of the interlocutory decree, and while the whole question still remained within the control of the trial Court up to the entry of the final decree, the respondent at the first opportunity, which was on the filing of the Master's report, filed a notice of motion to vacate and set aside the interlocutory decree and to reopen, rehear and reconsider and decide and determine the case. One of the grounds urged in the motion was that this being an action in equity, the Court could not award a judgment for damages, but should direct the return of the stock (R. 91).

Accompanying this motion was points and authorities citing cases sustaining this point. This motion was denied (R. 101).

In re: Wright Motor Co., Inc., 299 Fed. 106, cited in the opinion, a money judgment was ordered because the action was to recover moneys unlawfully

withdrawn from the corporation by manipulating its assets.

There was no dissent between the Judges of the Circuit Court on the proposition that this is an action under the state law. So, it does not involve the Bankruptcy Act as argued by petitioner, but as stated, the relief is governed wholly by the California law relating to an action by a creditor to set aside a fraudulent conveyance which obstructs the collection of his debt.

It cannot be doubted that the decision of the Circuit Court of Appeals for the return of the property which is available, is within the well settled principles of equity jurisdiction. This would restore the parties to their original position.

As stated, the judgment entered in this action goes beyond the principles of equity jurisdiction because it awards more than the value of the stock at the time of the transfer, and also requires the respondent to pay money when it has received no money on account of the transaction, instead of restoring the property.

The Circuit Court was not deciding the right of election on the part of the trustee, but was dealing with the question of what relief should be granted in a Court of Equity.

Furthermore, it would seem that the question is not involved in the matter, because the reversal was ultimately based on the finding that there was no fraud, and that the pledge was valid. If the Court had sustained the finding of fraud and reversed the

case on the ground that plaintiff should take the property and not damages, the question might be involved.

The Court has decided that the judgment was erroneous, but in the last analysis the finding that the transfer was not fraudulent should govern the disposition of the case.

It cannot be denied that, if the petitioner is entitled to prevail, that a decree directing the return of the stock, or for the value thereof in the event of the inability of respondent to return it, is equitable and would restore to the creditors of Henry Joseph Barceloux all that he possessed. The creditors are not entitled to profit, particularly in view of the fact that the law of California justifies a creditor in taking a preference.

THE CIRCUIT COURT OF APPEALS DID NOT TAKE ANY NEW EVIDENCE.

That part of the decision directing the sale of the stock was not based on the introduction of the certificate in evidence in the Circuit Court of Appeals, but was prompted by the desire of the Court and the respondent to end the litigation. All of this was to the advantage of the petitioner.

In the absence of any offer by the respondent, the decree was within the issues and is fully supported by the evidence. It directs the sale of the property and the disposition of the proceeds in accordance with the rights of the parties interested in the stock, to-wit: the right of the trustee as the successor in interest of

the bankrupt, the right of the respondent under its pledge, and the right of Freeman under his assignment subject to the pledges.

At the trial, George A. Barceloux testified that all of the securities had been transferred to the respondent prior to the trial and his note returned. This evidence is uncontradicted.

Therefore, the Court was dealing with a situation where the securities in question were in the possession of the corporation and that it had the legal title thereto.

The Court could have entered a judgment directing the sale of the securities if they were on hand, or if not, that the petitioner have a money judgment for the value thereof. This is the effect of the decision of the Circuit Court of Appeals.

The petitioner cannot complain because of this feature of the decree.

As to the stock not on hand, it is directed that the respondent credit the value thereof as fixed by the Master on the indebtedness secured by the pledges before making the sale. This is in excess of the amount actually received by the company for the stock because the Master found the highest value.

If the Court had reversed the judgment without any directions, then the respondent could have sold the property included in the pledges attacked in this action without demand or notice because of the waiver of demand and notice in the pledge agreements. The petitioner cannot complain of the directions that the trial Court should control the sale by fixing the time,

place and terms of sale of the stock and the application of the proceeds.

If the rights of any one are limited or restricted by the terms of the decree, it is the rights of the respondent and not the petitioner.

As the record clearly shows, no new evidence was received by the Circuit Court of Appeals, and its decree is supported by the record of the trial Court regardless of the offer made by the respondent in the Circuit Court. No tender of the stock in the Circuit Court of Appeals was necessary.

As shown by all of the authorities, it appearing that the securities were in the possession of the respondent, the Circuit Court unquestionably could direct the entry of a judgment that the stock be sold, or if not available, the value thereof be paid to the plaintiff.

It is very clear from the whole record that the petitioner is not seeking the return of this stock because he prefers to collect the money award representing its highest value rather than to take the stock itself. In other words, the petitioner is seeking the inequitable advantage of recovering not the stock but a profit, not actually received by respondent but based on a temporary increase in the value of the securities after the transfer.

No one will deny that under the condition of the company shown by this record that the enforcement of this judgment representing a one-fourth interest in the corporation will bankrupt it.

THE DECISION OF THE CIRCUIT COURT OF APPEALS ONLY DETERMINES THE RIGHTS OF THE PARTIES TO THE ACTION AND DOES NOT IN ANY WAY ATTEMPT TO ADJUST THE PRIORITIES OF THE CREDITORS OF THE BANKRUPT.

Again referring to the fact that by the bill, the petitioner only asked for judgment for the value of the property as of August 16th, 1926, less such sum, if any, as might be due to Mr. Freeman under his assignment, inevitably in view of these allegations of the bill, the judgment of the trial Court cannot stand because it awards the petitioner judgment for the whole value, and not the value less Mr. Freeman's demand.

Inasmuch as the Court directed the sale of the property to the advantage of the petitioner as stated, a direction as to the disposition of the proceeds was an indispensable part of the decree.

This transfer was made more than four months prior to bankruptcy.

Under the directions of the Court any proceeds of the sale would come into the hands of the plaintiff as an asset of the bankrupt's estate. Upon receipt of that money, then the Bankruptcy Court would adjust the priorities of the creditors.

The case of *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, cited on page 41 of petitioner's brief, sustains this decree.

The Court has not made any attempt to control the Bankruptcy Court in the disposition of the moneys which may come into the hands of the trustee.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, also cited on the same page, deals with the power of the Court where the validity of the lien is conceded.

In *Hiscock v. Varick Bank,* 206 U. S. 28, this Court held that the Bankruptcy Court is not empowered to direct the disposition of the pledge or the ascertainment of its value where the parties had failed to do so by their agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the Court may direct what shall be done in the premises.

To the same effect is the case of *Griffin v. Smith,* 177 Cal. 482, holding that where a pledge is created more than four months before the filing of the petition in bankruptcy its validity was in no way affected by the bankruptcy proceeding. That was an action to foreclose a pledge agreement which provided that the pledged property could be sold at public or private sale with or without notice to the pledgor. Judgment was entered directing the sale of the property. It was held that this right to sell could be exercised without resort to any Court, and was not affected by the bankruptcy proceedings. The decision is based on *Hiscock v. Varick Bank,* supra.

The Court having held this pledge to be valid, the trustee in bankruptcy has no power or authority to sell this property as suggested on page 40 of the petitioner's brief, because that power is vested in the respondent under the law, and particularly under its pledge agreements.

The pledge agreement being valid, the respondent has the legal right to sell the property to satisfy its

demand, and the only relief to which the petitioner is entitled is the right to receive the surplus after satisfying the pledge of the respondent and the judgment of Freeman secured by his assignment.

THE CIRCUIT COURT OF APPEALS DID NOT DECIDE THAT THE TRUSTEE IS PRECLUDED IN A SUIT ON BEHALF OF ALL THE CREDITORS FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXECUTION OF THE TRANSFER ASSAILED AS FRAUDULENT.

As stated, this action being based on the proposition that the transfers were made to defraud Freeman, the holding of the Court that the conduct of Freeman in accepting the assignment of the shares subject to the pledges with full knowledge of all of the facts and without questioning the pledge agreement, places him in a position where neither he nor the petitioner suing in the right of a creditor can successfully contend that any fraud existed.

Would any one contend that if Freeman had filed an action to set aside these transfers on the ground of fraud, that he could maintain such action in the face of his conduct?

The petitioner as trustee has no greater right than Freeman in attacking these transfers on the ground that they were made to defraud Freeman.

All of this goes to the question of fraud and the right of a creditor to attack the transfers.

The holding of the Court is epitomized in the statement printed on page 43 of petitioner's brief that:

> "So far as the right of the trustee in bankruptcy is predicated upon the right of Freeman to question the pledge to the company, it cannot be sustained for he cannot complain of the prior pledge to which he assented" (R. 458).

This is far from holding that the trustee is precluded from attacking the transfers on behalf of the other creditors because of the Freeman assignment. That the Court made no such holding clearly appears from the opinion.

Immediately following the above quotation is the statement that:

> "It remains to consider the rights of the trustee as a representative of other creditors existing at the time of the pledge to the company and the sale thereunder."

Attention is directed to the fact that the complaint does not allege the existence of a single creditor other than Freeman, nor that any other creditor was affected by the pledges and the sale.

The decision of the Circuit Court of Appeals does not deprive the trustee of the right of representing all creditors and in no way conflicts with the construction of Section 70e in *Moore v. Bay,* 284 U. S. 4.

It is too late for the petitioner to now assert that this action was prosecuted because the transfers were made to hinder, delay and defraud creditors generally. The evidence disproves this claim.

We have already reviewed the subsequent transfers and called the attention of the Court to the fact that this respondent was in no way connected with the same, and that the properties covered by these transfers were offered to Mr. Freeman as security and he declined to accept the same.

The argument that this action is prosecuted because the respondent Barceloux intended to hinder, delay and defraud the creditors generally is in direct contradiction of the pleadings, the proof and all of the arguments presented by the petitioner in support of his case.

That these pledges were not made to defraud either Freeman or the subsequent creditors is conclusively established by the fact that the bankrupt continued in business until his property was seized under execution by Mr. Freeman in November, 1926, and that during the period of time intervening between the assignment to Mr. Freeman and this levy, Mr. Freeman acted as attorney for the bankrupt and they were still cooperating to work out the payment of the judgment and not to defeat its payment.

The Court will search the record in vain for any suggestion by the respondent during the trial of the action, or in the presentation of the case to the Circuit Court of Appeals that the case was prosecuted on the theory that the pledges were made to defraud any creditor except Freeman.

The decision of the Circuit Court of Appeals on this point is logical and is directed to the point of ascertaining whether or not a case had been made by

the petitioner claiming the same rights as a creditor under the laws of the state.

THE TRANSFER OF THE SECURITIES BY GEORGE A. BARCELOUX IN SATISFACTION OF THE PLEDGE TO THE COMPANY WAS VALID AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA.

At the sale to satisfy the pledges, the property was bid in by George A. Barceloux, who executed a promissory note to the corporation and pledged the property purchased as security therefor.

It must be conceded that George A. Barceloux had knowledge of all of the transactions involved in this action.

The argument of the petitioner on this point reduces itself to an absurdity. The bill alleges that the pledgee's sale was fraudulent, irregular and void and prays the Court that it be set aside.

The title of the respondent is based on the pledge and the sale. If no title vested in George A. Barceloux because of the invalidity of the sale, then the title remains in the Peter Barceloux Company, and of course no question arises as to a corporation purchasing its own stock.

If the title to the securities vested in George A. Barceloux, and as the undisputed evidence shows, were in turn pledged by him as collateral security to the respondent, then it is unquestionable that the respondent had the power to accept these shares of stock in satisfaction of the debt. This was not a trans-

fer for the purpose of dividing the assets of the corporation.

There is no conflict in the California authorities on the subject of the right of a corporation to purchase or take its own stock pledged to it as collateral security.

Ralston v. Bank of California, 112 Cal. 208, is a leading case on the subject and is not in conflict with any of the authorities cited in the brief.

The whole subject is reviewed and considered in the case of *Stewart v. Stewart Hotel Co.,* 33 Cal. App. 167, and it is there held that the general rule prohibiting a corporation from purchasing its stock is subject to exceptions, and that in California there is no law in terms forbidding a corporation from buying its capital stock, or that such a purchase is *ipso facto void.*

In that case, the plaintiff's stock was purchased by the use of the assets of the corporation and no question of taking it in satisfaction of a pledge in favor of the company was involved.

In *Stevens v. Boyes Hot Springs Co.,* 113 Cal. App. 479, the corporation executed its promissory note in direct purchase of certain shares of its capital stock.

THIS IS NOT AN ACTION FOR CONVERSION NOR WAS THE RESPONDENT GUILTY OF CONVERSION IF THERE WERE SOME IRREGULARITIES IN THE SALE.

If this is an action for conversion, then a Court of Equity has no jurisdiction of the subject matter there-

of, and could not award the plaintiff a money judgment.

Petitioner recognizes this rule because it is sought to avoid its application by the statement on page 54 of the brief:

> "And since this suit was rightly begun in equity upon the facts pleaded in the bill and admitted by the answer, the supposed conversion developing for the first time as a technical legal consequence of the holding of the Circuit Court of Appeals supports the judgment of the trial court, which was for the value of the shares so sold and transferred".

Neither is this a question arising incidentally in a case rightly begun in equity. Such a position cannot be consistently maintained by the petitioner in view of the fact that the bill in equity alleges the sale to George A. Barceloux and attacks its validity and prays for judgment that the sales be declared void.

On reargument in the Circuit Court of Appeals, the petitioner and respondent submitted typewritten briefs. The best answer to the claim of conversion now made by petitioner is the following argument which we take the liberty of quoting from page 16 of his typewritten brief:

> "It is this creditors' (not creditor's) suit which devolves as a right of action in the trustee under Bankruptcy Act, Section 70e. We believe that a reading of Bankruptcy Act, Section 70, as a whole, will show that under subdivision 'a' (Section 70a) the trustee's right of action may be either legal or equitable, in either case derived from and through the bankrupt, but under

Section 70e it must always be equitable and derived from the creditors. We say this because under California Civil Code, Sections 3439 and 3440, a transfer in fraud of creditors is void as against creditors and all others mentioned in the statute; but it may not be void between the debtor and the transferee, for if there is anything left after the creditors are satisfied the debtor or the transferee will have it. In a law court it would be wholly void or wholly valid, speaking of federal courts which preserve legal and equitable distinctions. This suit proceeds under Section 70e and not under Section 70a.

Therefore, it is not the same as those causes of action which belonged to the bankrupt on the day of adjudication and which, by Bankruptcy Act, Section 70a (6), are taken as part of the estate of the bankrupt. Section 70a (6) reads: 'rights of action upon contracts or from the unlawful taking or detention of, or injury to, his property,' that is the bankrupt's property. Now it is perfectly clear that the bankrupt as against defendant Peter Barceloux Company on the day of adjudication had no property in these shares capable of being converted. The law of California is that:

> 'Conversion is a tort, and to establish it there must be a tortious act.' *Steele v. Marsicano,* 102 Cal. 666, 669.
>
> 'One who obtains a thing without consent of its owner, or by a consent afterwards rescinded,' is under an obligation to restore it. *California Civil Code,* Section 1712.

It will be noticed that this statute does not contain the word 'conversion' but is contained in

that part of the Civil Code defining torts, and it is this tort which is commonly called conversion.

> Shares of stock with or without the certificate may be the subject of conversion. *Payne v. Elliott,* 54 Cal. 339.
>
> 'To enable a plaintiff to recover for property taken by a wrongdoer, he must have the general ownership or a special ownership in the goods, and one having the possession merely is the owner as against a wrongdoer.' *Rosenthal v. McMann,* 93 Cal. 505, 508.

Tested by these rules, the bill does not allege anything to show that the bankrupt on the day of adjudication could have maintained an action for conversion against Peter Barceloux Company for these shares. The allegations of his fraudulent consent show that he could not have done so. Therefore, plaintiff cannot sue as successor to the bankrupt's estate under Bankruptcy Act, Section 70a (6). More than that, when the trustee sues under Section 70e, he sues for all the creditors; and it is plain that the creditors, including Freeman, could not have sued for a conversion.

And so it must be true that plaintiff, suing in the creditors' right, is not suing for a conversion, since no creditor could sue in conversion. Suing for value of the property is quite a different matter. *This suit is for value, but not for damages for conversion.* The value sued for is the value of the equities of which the bankrupt's creditors were deprived by the fraudulent transfer, all the value for all the creditors, the surplus, if any, reverting to the bankrupt's transferee when all the creditors are satisfied. But

> that suit must always be in equity, whether property be recovered to be reduced to money or money be recovered directly.
>
> It is thus demonstrable that this suit and this bill will not sustain any construction as an action for conversion, a common law tort".

Therefore, all of these facts were presented in the pleadings of the petitioner, and the subject of conversion was presented to the Court. The statement in the petitioner's brief, that the supposed conversion developing for the first time as a technical legal consequence of the holding of the Circuit Court of Appeals is inaccurate.

Under the new equity rule, if this be an action for conversion, then a Court of Equity has no jurisdiction thereof, and the case was not rightly begun in equity because the petitioner was in the full possession of the facts, as is shown by his pleading.

In *Griffin v. Smith,* 177 Cal. 482, the Court says:

> "Since the pledge was created more than four months before the filing of the petition in bankruptcy its validity was in no way affected by the bankrupt proceedings, and the trustee would only have taken such interest in the stock as the debtor had and since the pledgee under the terms of the agreement had the right to sell and apply the proceeds to the payment of his debt, he, the pledgee, had a right which might have been exercised without resort to any court and such right not affect the bankrupt proceedings. (Hiscock v. Varick, 206 U. S. 28, 51 L. Ed. 945, 27 Sup. Ct. Rep. 681.)"

Assuming for the sake of the argument that the sale was invalid, the pledges of the respondent still exist, and were not destroyed by such invalid sale.

In *Williams v. Ash,* 111 Cal. 180 (185), the Supreme Court of California pointed out the distinction between an invalid or irregular sale to satisfy a lien, and one to satisfy a pledge. It was held that the pledge was not destroyed.

The case of *Lowe v. Ozmun,* 3 Cal. App. 387, cited by petitioner on page 55 of the brief, is not identical in facts with the case at bar. In that case after the irregular sale, Ozmun claimed the bonds adversely to plaintiff and that plaintiff had no right to redeem the sale. He acted in defiance of plaintiff's rights.

No question was raised as to the validity of this sale until the filing of this action. Respondent's rights are based on its pledge. If the sale was irregular or invalid, the pledge is not destroyed, nor could the respondent be guilty of conversion unless it asserted something in defiance of the plaintiff's rights.

The case of *Bell v. Bank of California,* 153 Cal. 234, does not deal with the question of conversion but only involves the statute of limitations.

In *Henning v. Akin,* 91 Cal. App. 246, plaintiff was seeking to recover the surplus remaining in the hands of the pledgee over and above the debt after an invalid sale of the pledged property.

In *Dibert v. Wernickle,* 214 Fed. 672, the pledgee purchased at his own sale and for the avowed purpose of acquiring ownership.

Feilback Co. v. Russell, 233 Fed. 412, involved the sale of property acquired under a preferential transfer made within four months of the adjudication of bankrupt.

THERE WAS AN IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

The respondent raised the question as to the existence of the antecedent pledge, in support of its point that, if such pledge existed, it was not attacked in this proceeding, was valid and the respondent was entitled to the certificates to secure that antecedent pledge, regardless of the validity of the pledges in question.

Counsel is in error in the statement that the question was raised at the trial for the purpose of defeating the legal effect of the lack of delivery under the written pledge agreement dated April 27th, 1926. The trial Court's holding that there was a lack of delivery under the pledges of April 27th, 1926, and June 29th, 1926, is shown by the following excerpt from the opinion:

> "In respect to the pledge of the 2494 shares to defendant corporation, it appears that if it was attempted to be made before Henry resigned as president, it was void for that the pledged certificate and any writing of pledge until said time were in his possession along with all other corporate documents and books" (R. 33).

The evidence as to the antecedent pledge was offered by petitioner when he called the two Barceloux as witnesses. If their testimony is to be rejected as suggested in the brief, then there is an absence of any evidence in the record raising any question on which to base a finding of lack of delivery at any time.

However, as shown by the quotation from the opinion of the Court, instead of disbelieving the testimony of these witnesses, the Court accepted it and then decided that as a question of law, there was no evidence of possession, because the shares in question were in the possession of Barceloux along with all the other corporate documents and books. It is undisputed that after his resignation on July 28th, 1926, the shares of stock were in the actual custody and control of the corporation.

How can petitioner argue that these shares were not in the possession of the respondent, in view of the conduct of Mr. Freeman and his acceptance of an assignment subject to the pledge?

Aside from the question of possession under the antecedent pledge, both the pleadings and the proof show an actual, immediate and continued change of possession after the date of the pledges in question. It is undisputed that if the pledgor had any possession of the shares of stock it was not in his individual capacity.

As the Court found, his only possession of these certificates was with the other corporate books and documents.

Furthermore, Certificate No. 5 contains a proper endorsement showing the pledge to the respondent.

Mr. Freeman testified at page 411 of the transcript of the record that the statement furnished him as of June 24th, 1926, contained a statement of this pledge.

In *Feeley v. Boyd,* 143 Cal. 282, it is stated that Section 3440 should receive a reasonable construction and that it did not require delivery *instanter.*

However, Mr. Barceloux testified that on the signing of the pledge agreement, the shares were returned to the safe deposit box of the company. Although he may have had access to the safe deposit box of the company, as president, still the deposit of these shares in that safe deposit box was a sufficient delivery.

Under the California authorities, the party making the delivery is not precluded from having some connection or control thereof if consistent with the original transaction.

Manor v. Dunfield, 33 Cal. App. 560.

Barceloux had possession of the shares as president of the corporation and he was acting under the direction and control of the corporation.

Section 3440 of *California Civil Code* only applies to a transfer "if made by a person having at the time the possession or control of the property." Barceloux individually, had neither possession nor control.

In *Hilliker v. Kuhn,* 71 Cal. 220, it is held that if the pledgor after delivering possession to the pledgee, either with or without his knowledge or consent, had

for a time taken charge of the property, this would not be in violation of Section 3440, of *California Civil Code.*

In *Sexton v. Kessler & Co.*, 172 Fed. 535, a banking house by agreement, and to provide security for drafts drawn by it in the course of business on its correspondent in England, placed certain stocks and bonds either transferable by delivery or endorsed in blank in an envelope in its safe deposit vault marked "Escrow, for account of" the Manchester House, and furnished that house with a list of securities giving their market value. These transactions were entered on the books of the New York House. This house subsequently failed and the trustee in bankruptcy brought an action in equity to set aside the transfer. The District Court held that there was a delivery of the securities. The transfer was attacked, on the ground that there was no delivery of possession to the Manchester House. It was conceded that a delivery was necessary to constitute a valid pledge.

The Circuit Court of Appeals held that intention to secure was plain; that what the parties did clearly evidenced their intention. There was a family relation between the two houses and they had been dealing with each other for a long time. It was held that the Manchester House was entitled to the possession of the securities.

On page 58 of petitioner's brief, an attempt is made to demonstrate the falsity of the testimony of George Barceloux by referring to Defendant's Exhibit No. 7, with the comment that the books do not show a debit

balance in favor of the corporation until June 28th, 1923.

This Exhibit 7 is a ledger sheet which starts with a balance, but petitioner overlooks the testimony of Mr. George A. Barceloux that this ledger sheet does not cover the whole period of the transactions involved, but was a new sheet. In testifying therefrom, the witness stated that it was started as of December 31st, 1922, and was apparently carried over from the other book and went down to the time the note of June 17th, 1925, was taken (R. 326).

Furthermore, the letter of Ware & Ware to Mr. Freeman mentions the fact that they had told him over the phone that before your assignment was ever made a proper entry on the books of the company was made showing the pledge of this stock (R. 407).

If the facts referred to on page 58 of petitioner's brief stamps the testimony of Barceloux as false, we repeat that the petitioner is without any evidence showing that there was no delivery and no previous pledge.

It must be borne in mind that much of the testimony of Mr. Barceloux was in relation to what the ledger sheet showed.

The promissory notes were introduced in evidence and in the absence of any testimony are presumed to have been executed on their dates and for a valuable consideration.

There is not a single entry in the ledger sheets inconsistent with the testimony of George and Henry Barceloux.

Assertion is made on page 58 of petitioner's brief that the documentary proof shows that the indebtedness of Barceloux was paid off prior to 1923, thereby terminating the antecedent pledge. There is no evidence to support this statement and it is entirely contradicted by the testimony of Freeman and his conduct with reference to these pledges.

THERE IS NO SUBSTANTIAL CONFLICT IN THE EVIDENCE AND ALL OF THE WRITTEN EVIDENCE IS INCONSISTENT WITH THE CLAIM OF FRAUD.

On page 62 of the petitioner's brief it is urged that the findings of fact should not be reversed on appeal when based on the testimony of witnesses heard and observed by the trial Court, and also on written evidence, consistent with his findings and inconsistent with contrary findings.

As we have already stated, the case was submitted to the trial Judge on the testimony of George and Henry Barceloux and Mr. Freeman and writings. The Trial Court did not disregard the testimony of George and Henry Barceloux, but based its decision upon inferences drawn from that testimony. This is conceded by petitioner in a statement on page 67 of the brief that "there is no conflict in the facts or sequence of the various transactions between the bankrupt and respondent company, but the only conflict, if any, is in inferences that may be deduced from these facts."

Petitioner does not specify a single writing inconsistent with the fairness of the transactions involved.

Generally stated, the writings introduced in evidence consisted of the book accounts of both the respondent and Henry Joseph Barceloux; Certificate No. 5 properly endorsed and cancelled; Certificate No. 12 issued after the pledge agreement in lieu of Certificate No. 5; the written pledges; the minutes and records of the corporation, and the correspondence between Mr. Freeman and Mr. Ware.

All of this written evidence is inconsistent with the idea of fraud.

There is no uncertainty in the opinion of the Circuit Court of Appeals. It heard this case *de novo* and its finding that there was a valid pledge and no fraud is not to be disregarded.

Having held that there was no fraud, as petitioner admits on page 63 of his brief, the other questions are eliminated from the case.

As stated, the law of California authorizes preferences. Mere insolvency does not defeat the preference. It is immaterial if the creditor knows that the debtor is insolvent or in failing condition, except that knowledge of insolvency may be mere evidence of an attempt to create and receive a fraudulent preference.

It cannot be denied that there was a valuable consideration for all of these transactions. The only question raised was the statement of Mr. Freeman that he understood the indebtedness to be $24,000.00. Furthermore, there is no evidence showing a lack of consideration and the writings raise the presumption of a consideration.

As stated in 12 *California Jurisprudence,* 1012, cited by petitioner, it is necessary to show that the creditor was helping the debtor cover up his property to keep others from seizing it, to establish the petitioner's case.

Freeman could have levied an execution on this property at any time, either before or after the pledge agreements, and sold the equity of Barceloux.

There is no evidence justifying a finding that the respondent was endeavoring to assist Barceloux in covering up his property. If such had been the intention, the securities would have been transferred to the respondent in satisfaction of its demands, instead of being pledged.

Cases are cited on page 64 of petitioner's brief that a creditor receiving a preference must take only enough to satisfy his debt. These cases apply to a transfer and not to a pledge.

The two pledges involved in this action amount to nothing more than the execution of written pledge agreements to evidence a pledge previously made by deposit of the securities.

How can it be said that the pledge of June 29th, 1926, was intended to cover up the properties of the bankrupt, when it was made after both Mr. Freeman and the respondent had been satisfied, and particularly in view of the fact that after investigation Mr. Freeman declined to accept these stocks as security for his judgment.

It is manifest that there would have been no bankruptcy had not Mr. Freeman issued execution on his judgment in November, 1926.

Much is said in the brief of petitioner as to the sequence of events.

As heretofore stated, there was no sequence of events so far as the respondent is concerned. The respondent was not connected with any transactions subsequent to the execution of the pledge of June 29th, 1926, except the sale. Furthermore, the transactions of Henry Joseph Barceloux after the pledges consisted of efforts to conserve his properties and to take care of obligations in favor of other persons as he had taken care of Mr. Freeman.

The statement that all of the bankrupt's property of the value of $180,000.00 was, at the date of his adjudication as a bankrupt, transferred to and held by the respondent and members of Henry's family, is incorrect.

The only property that the respondent received is the stock in question. If Barceloux possessed property of this value, is it not singular, as well as most significant that, in September, 1926, when Freeman learned of the pledge sale, he made no effort to execute on his judgment.

The subsequent transactions between Henry Joseph Barceloux and the members of his family have been analyzed. All of them were based on a valid consideration. None of them realized anything from such transactions. Moreover, Mr. Freeman, the principal

and only active creditor of Mr. Barceloux, had been offered his choice, these, as well as other properties, as security for his judgment.

Consequently, it cannot be argued that there was any intent, fraudulent or otherwise, to hinder, delay or defraud any creditor.

On page 71 of the petitioner's brief, it is stated that the bankrupt conveyed his only unincumbered substantial asset to the Barceloux family. This is predicated on the assumption that no antecedent pledge existed.

As we have said, the antecedent pledge is established by the testimony of the Barcelouxs, as well as the written endorsement on Certificate No. 5, and the possession of this certificate by the respondent.

If we are to ignore the testimony of the Barcelouxs, then the certificate with this written endorsement, necessitates a finding that the antecedent pledge existed, because such is the presumption in the absence of evidence to the contrary.

On page 72 of petitioner's brief, the pledges are attacked on the ground that the respondent accepted excessive security. While the acceptance of excessive security is to be considered in connection with other facts, still standing by itself, it is not sufficient to sustain petitioner's case.

Mr. Freeman testified that he took the stock because the statement furnished him by Barceloux valued it at $80,000.00, and that he was familiar with the Peter Barceloux Company assets and that he was in-

formed by Barceloux that he owed the company $24,000.00. His statement that he did not know of any other indebtedness is contradicted by the paper he submitted to the corporation leaving the amount blank because there was other indebtedness to be included. He took the Lake County Ranch, as he says, in addition to the assignment of the stock of the respondent, at the same time "because I wanted ample security for this obligation" (R. 416).

Another significant statement of Mr. Freeman is that at the time of the trial he did not know for what obligation the stock was eventually sold. Why his indifference or lack of interest in the sale in not having enquired into the obligations for which it was sold from September, 1926, after he learned of the sale, and before the date of the trial on March 11th, 1929.

THE SECURITIES WERE NOT SOLD FOR ANY INDEBTEDNESS NOT SECURED BY THE PLEDGE.

The only item seriously challenged by petitioner's evidence as not being secured by the pledge is that of $1,800.00 plus $830.00 interest.

The Circuit Court of Appeals held that this item was not due the company and should not have been charged against the proceeds of the sale, for it was an indebtedness due the father, Peter Barceloux, and was not transferred to the company. It was also held that this claim was made in good faith.

We respectfully suggest that neither Henry Joseph Barceloux, nor the trustee is in a position to deny that this item belonged to the company.

By reference to page 53 of the transcript of the record, the Court will find that this Cartenberg land agreement was valued at $4500.00 by the Master as of August 16th, 1926. Henry Joseph Barceloux testified that the interest of Peter Barceloux in the Cartenberg contract was not assigned to the Peter Barceloux Company by a separate written instrument, but might have been assigned by a blaak assignment with a lot of other property (R. 377).

On page 319 of the record, George A. Barceloux testifies that the interest of Peter Barceloux in this contract was transferred by instrument delivered by the father to the corporation in 1912. That the father was operating the corporation then, and continued in its management until 1918 (R. 319).

The $1800.00 item grows out of the purchase of a tract of land by Charles L. Donohoe, Henry Barceloux and Peter Barceloux, the title of which was vested in the name of Henry Barceloux. Henry sold the property from time to time from and after the organization of the company, and during the time Peter Barceloux was handling its affairs, his share of the Cartenberg contract was collected by him and turned over to the company as its property (R. 317, 318).

This constituted an equitable assignment, because it clearly appears from the entire transaction that it was the intention of the parties to pass the title to this

money to the company. No formal assignment was necessary.

Puterbaugh v. McCray, 25 Cal. App. 470.

Certainly Peter Barceloux, under this state of facts, could not successfully maintain that the respondent was not entitled to receive his share of the money due on this deal.

Henry did not pay all of this share to the company, but was charged with it on the books of the company. All of the parties recognized it as the property of the company. Henry Joseph Barceloux could not contend that the company was not entitled to receive and claim this money.

The testimony shows that Henry agreed with the company that he owed this money and was willing to pay interest thereon (R. 319).

However, if it be assumed that the item was not legally due the respondent, then the sale was merely irregular, and did not deprive the respondent of its lien for the other items which are admittedly due it. This irregularity would not entitle the petitioner to judgment that the whole transaction was fraudulent, but his only relief would be that the sale was irregular, leaving to the respondent its rights under the law to resell the property.

On page 74 of petitioner's brief, the sale is attacked because interest was charged on an open account. No such attack is made in the bill. This item represents $1717.62 cash advanced. It is not an open account as suggested by petitioner.

The item being for moneys loaned, it is presumed to be made upon interest unless it is otherwise expressly stipulated at the time of the writing.

Civil Code of California, Section 1914.

THE PLEDGE SALE WAS REGULARLY AND FAIRLY CONDUCTED.

We submit that there is no evidence in the record sustaining the proposition that at the sale there was no outcry, no bids invited, or that the sale was conducted in any other than in the usual manner of making such sale. There was no offer to prove that others were prepared to purchase and might have done so but for want of information, or that any one was prepared to redeem the pledge or that any one had offered to redeem it.

There was nothing in the evidence tending to show a wanton sacrifice or an intent to buy in at an inadequate price so as to justify the inference of fraudulent purpose.

As this Court held in *Hiscock v. Varick Bank,* 206 U. S. 28, a sale of collateral security at public auction without notice where the pledge so provides, and the purchase thereof by the pledgees are not void as against the trustee in bankruptcy of the pledgor in the absence of fraud, and that such sale is valid. Also that the burden of proof that a sale by the pledgee of the property of the bankrupt made conformable to the contract of pledge was unfair is on the trustee in

bankruptcy of the pledgor who seeks to avoid the sale.

The only evidence introduced in support of these allegations of the bill is the testimony of George A. Barceloux and Mrs. Gelinas and the minutes of the corporation.

Resolutions were regularly adopted, notice was given as required by law, a notice of sale was posted on a telegraph pole in front of the office of Mr. Freeman, the sale had on the Court House steps, the notice was read, bids were invited, the call was made three times, no bidders appeared (R. 316). Mrs. Gelinas testified that they stayed quite a while after reading the notice, perhaps an hour (R. 384).

The law does not require a corporation to forbear the enforcement of a valid lien until such time as the property might be valuable enough to satisfy all demands.

There is nothing to distinguish this sale from similar sales under existing pledge or foreclosure. It is undisputed that the notice of the sale was legal.

No inference of fraud can be deduced from the failure of the respondent to give notice to Freeman.

The indifference of Freeman, after learning in September, 1926, that the property had been sold, and his failure to take any action whatever to attack that sale justifies the inference that he knew of the sale and he had recognized it as a valid proceeding.

On page 415 of the record Freeman testifies that after giving notice of his assignment he did nothing

"and as to whether being present at the sale of this stock I would have paid the amount of their claim against it is a matter that would have had to be determined at that time and what I would have done I think that is entirely immaterial and a conclusion on my part."

On page 76 of petitioner's brief, it is argued that because one member of a family takes security from another member of the family, as stated therein, necessarily an inference must be deduced that there is some agreement between them that all of the property or a portion thereof will be returned to the debtor when his financial troubles are over and after he has been discharged as bankrupt.

Such a suggestion may be dismissed with the statement that it is not supported by anything in either the pleadings or the proof. It is also completely disproven by the act of respondent in selling the stock. A finding that a secret trust existed must be based upon something besides the imagination of counsel.

PART TWO.

OTHER GROUNDS DISCLOSED BY THE RECORD RELIED UPON BY RESPONDENT AS GROUNDS FOR REVERSAL NOT DECIDED BY THE CIRCUIT COURT OF APPEALS.

If all of the above questions are determined adversely to respondent, there still remains numerous grounds on which respondent is entitled to a reversal of the decree and which were not decided by the Circuit Court of Appeals.

Respondent does not rely entirely upon the points decided by the Circuit Court of Appeals.

The record discloses other grounds not considered by that Court for reversing the judgment and ordering a new trial.

Under these circumstances, it is open to this Court to deal only with the matter considered by the Circuit Court of Appeals and to remand the case to it for any needed action upon other questions, or to proceed to a complete decision.

Cole v. Ralph, 252 U. S. 286.

In view of this rule, we will now call attention to the points urged as grounds of reversal and not decided by the Circuit Court of Appeals:

A. The Court had no jurisdiction to enter a judgment for the full value of the property pledged, because petitioner is only entitled to the value of the property as of August 16th, less the amount due on the Freeman judgment.

Paragraph IV of the bill alleges the value of the 2499 shares of the capital stock of the respondent pledged April 27th, 1926, to be the sum of $80,000.00 (R. 5). That the value of the shares of stock pledged on June 29th, 1926, is the sum of $2100.00 (R. 6).

Paragraph X of the bill (R. 11) alleges the Freeman assignment and that an accounting is necessary to ascertain what, if any, moneys were at the time of the sale due to the respondent, and to ascertain what moneys, if any, were due to Freeman upon the security of his assignment at the time of the sale, and at the time of the filing of the action. Also, that complainant is entitled to recover from defendant, Peter

Barceloux Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still due and owing, and the value of all of said shares of stock at the time of said sale (R. 12).

The prayer specifically asks for "judgment against the defendant, Peter Barceloux Company, for the value of all of said shares of stock at the time of said sale, to-wit, August 16th, 1926, less such sum, if any, as may be found to be due or owing to George R. Freeman, as administrator, etc."

Indisputably, the right asserted by petitioner in his bill, is to the value of the stock less the Freeman demand.

The judgment awards him not only the full value of the stock regardless of the amount due Freeman, but the highest value between the date of the pledges and the date of the audit.

Notwithstanding the assignment of this stock and the execution of the deed of trust was made to Freeman at the same time and under similar conditions as the pledges to the respondent, the trustee does not question the Freeman transaction, but recognizes it as valid, and only seeks the value in excess of the Freeman demand as stated.

The measure of his rights is fixed by the allegations and the prayer of the bill.

The judgment for the highest market value evidently originated in the mind of the trial judge, be-

cause such relief did not appear in the case until the filing of the opinion.

The petitioner's recovery is in excess of the rights claimed by him in his bill.

This judgment is clearly erroneous. This point has been decided by the Supreme Court of California in the case of *Meisner v. McIntosh*, 205 Cal. 11:

> "In this we think appellants are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be proved, a court cannot decree to any plaintiff more than he claims in his bill or other pleadings' (15 R. C. L. 604). 'A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint' (33 'Cor. Jur. 1164). 'The judgment is for $7470 and costs. The plaintiff prayed for the sum of six thousand dollars, the value of the property, and five hundred dollars damages, and the prayer followed the ad damnum clause of the complaint, which alleges that plaintiff has been damaged in the sum of five hundred dollars by reason of the detention. In the absence of an amendment to the complaint, therefore, the court could not allow any damages beyond the amount prayed for' (Burke v. Koch, 75 Cal. 356, 360 (17 Pac. 228, 229).) The judgment was accordingly modified by striking out the amount thereof and inserting the sum of $6500. The judgment was not by default, but was rendered after a trial of the action upon its merits. 'The finding of damage is for an amount greater than the complaint avers. Still, the find-

ing necessarily establishes that plaintiff was damaged to the amount he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question.' Kerry v. Pacific Marine Co., 121 Cal. 564, 573 (66 Am. St. Rep. 65, 54 Pac. 89, 92)."

Therefore, the judgment here in excess of the amount of damages claimed or demanded by petitioner cannot stand.

B. The Court had no jurisdiction to enter judgment in excess of the value alleged in the complaint, and particularly for the highest market value between the date of the pledges and the audit.

As we have shown, the pleading distinctly alleges the value of the property (R. 546). The prayer is for the recovery of the value as of August 16th, 1926.

Under the authority of *Meisner v. McIntosh*, supra, a judgment in excess of the amount prayed for in the complaint is erroneous even if we assume that petitioner is entitled to the full value of the stock instead of the value thereof less the amount due Freeman.

In the dissenting opinion it is suggested that the allegation of value in the bill is a mere approximation, the accuracy of which is sought to be tested both in the allegations and in the prayer of the bill (R. 473).

As stated, the bill specifically alleges the value of the stock.

The statement that plaintiff has no means of ascertaining the actual value of such shares other than by

inquiry as to the value of the assets and liabilities does not make this statement a mere estimate. On the contrary, the allegation of the necessity of an inquiry is for the purpose of establishing the valuations alleged in the bill.

Aside from the allegations of the bill on the subject of value, the recovery of petitioner is measured by the prayer.

If this is to be treated as an action of accounting, then the following rule announced in *Horan v. Consolidated Mining etc. Co.*, 41 Cal. App. 337, applies:

> "The allegation as to the damage which the plaintiffs therein assert that they have sustained by reason of the retention of the property mentioned involves merely the statement of the value of the property, which is not only a proper but a necessary fact to be stated in an action for an accounting to meet the possible contingency that the party charged with having possession of the assets of which the accounting is asked has disposed of or in some way divested himself of such possession and is, therefore, in no position to account for the property in kind. The horses, wagon, and harness constituted a part of the account between the parties as to which an accounting is sought, and, this being a suit in equity for an accounting, it was, as above indicated, proper herein to allow damages as an essential element of the accounting, if it was made to appear that the property itself could not be accounted for. (1 Cyc. p. 408, and cases cited in footnote.)"

We quote the following from 12 *Ruling Case Law*, 641:

> "A fraudulent grantee cannot be required to account to the creditors of his vendor for any greater sum than the value of the property acquired by him under the transfer, and he may relieve himself from liability to the creditors of his grantor by paying to bona fide creditors a sum of money equal to the value of such property, or he may claim credit pro tanto for a smaller sum so paid, and it is immaterial that he was compelled to make such payment by legal process; but in such case the burden is on the fraudulent grantee not only to show the payment, but also to show that the debts discharged were subsisting, legal, bona fide demands against his grantor. The whole object of the law is to make the grantee disgorge the ill-gotten gain by virtue of the fraudulent transaction. When he does this, either by returning the property or its equivalent in money, he cannot be punished by making him pay more."

This is not an action for conversion and the rule declared in Section 3336 of the *Civil Code of California* is not applicable. It is a special rule of damages applicable to actions of conversion. The conversion referred to in that section is for the wrongful appropriation of goods, chattels or personal property.

Lynch v. McGhan, 7 Cal. App. 132, holds that Section 3336 is a special measure of damages for the conversion of personal property and does not apply to other cases where damages are sought.

If this is to be treated as an action for damages for fraud, it is covered by Section 3333 of the *Civil Code of California,* providing that for the breach of

an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by the code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Armstrong v. Lassen Lumber & Box Co., 204 Cal. 533.

In this equitable action for accounting, this rule is not applicable for the reasons mentioned, and because it is an arbitrary rule prescribed by statute.

Section 3336 has been amended several times.

It is held in *Tulley v. Tranor,* 53 Cal. 274, that the rule of damages declared in Section 3336 as it existed at the time of the filing of this action was arbitrary.

Even in an action of conversion, the rule prescribed by Section 3336 cannot be applied unless there was a finding of due diligence in the prosecution of the action, and that "a whole year having elapsed between the commencement of the action and the trial, it cannot be concluded as a matter of law, that it was prosecuted with due diligence."

This stock was transferred in April and June, 1926, the trustee was appointed in March, 1927, and the action filed in March, 1928. Consequently, the delay in prosecuting the action after the appointment of the trustee precludes the application of this rule of damages.

C. Assuming that petitioner was entitled to recover the highest market value, still the value fixed by the Master and by the judgment is not the highest market value under the law.

This point was presented by the opening brief filed by respondent in the Circuit Court of Appeals on pages 102 et seq.

The Master did not ascertain the highest value of the shares included in the pledge, based on their situation at the time of the transfer. On the contrary, the Master took the various assets of the corporation and ascertained the highest value of each asset on different dates. Stocks thereafter acquired in exchange for some of those owned on August 16th, 1926, were valued in a similar manner.

In the case of *Lightner Mining Co. v. Lane,* 161 Cal. 704, the phrase "highest market value" was defined as follows:

> "The subsequent highest market value referred to in the second clause of section 3336, ordinarily means the subsequent value of the thing *in the condition it was in at the time of the conversion.* It would not include a value added to it by reason of an improved condition given to it by the defendant after conversion. Of course, if the property taken can be identified in its changed condition, the rightful owner may retake it as it is, since the title remains in him, and he may thus in that case obtain the benefit of the improved condition."

Instead of valuing the stocks in the condition in which they were at the time of the transfer, the decree awards the highest value of the stocks owned, as well

as stocks received in exchange for some of the stocks owned at the time, between the date of the transfer and the date of the audit.

To avoid unnecessarily extending the length of this brief, we are taking the liberty of referring to the argument contained in the brief filed in the Circuit Court of Appeals.

The Master was called on to determine the value of the shares of the Peter Barceloux Company according to the decree. The Master did not fix the aggregate value of the stock owned by the corporation on any particular date, but took the highest value of the different stocks on different dates. The Master should have selected some date and fixed the value of the Peter Barceloux Company stock by taking the highest value of all of its assets on that date. To attempt to value it by taking the highest value of different assets on different dates would not be a determination of the value of the Peter Barceloux Company stock on any given date.

It is not pretended that the value fixed by the Master is the value on August 16th, 1926. The Master fixed the value of the Peter Barceloux Company stock on September 26th, 1929, by taking a period of three years or more, and finding the highest value of each of its assets on any day during that period.

The Master's report shows that he determined the value of the Peter Barceloux Company stock by taking up the valuations of its different assets on different dates and placing a value on the stock equivalent

to the result shown by such figures. From this, he deducted the liabilities of the company.

D. That the valuation of the stock of the Peter Barceloux Company has not been fixed as required by law, because essential factors affecting the fixing of the value of the stock were disregarded by the Master.

We do not dispute the right of the Master to consider the value of the assets of the corporation, but we do dispute the legal right of the Master to place a value on the physical assets, and valuing the stock of the corporation accordingly, without taking into consideration other important facts recognized and declared by law as affecting the value.

This question is also presented at pages 109 et seq., of the brief filed by respondent in support of its appeal.

The case of *Henry v. Phillips,* 165 Cal. 134, is cited as sustaining the rule that such a valuation depends upon many facts and circumstances, such as the value of the property and assets owned, the dividends paid, the character and permanency of the business, the control of the stock, the management, and other facts.

We have also cited the case of *Western Union Tel. Co. v. Poe,* 61 Fed. 449, wherein the late Chief Justice Taft discussed the elements constituting the value of a corporation and its capital stock. The case arose under an Act of Ohio requiring the Assessor in determining value of property for assessments to "be guided by the value of such property as determined by the value of the entire capital stock of said companies." In this opinion it is stated:

> "It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company."

The opinion calls attention to the many factors to be considered in fixing the value.

In fixing the value of this stock the Master disregarded the following factors:

1. It is a family corporation;

2. Reservation of Lumina Barceloux of the earnings during her lifetime;

3. Corporation operating at a loss for three years;

4. Only one dividend declared during corporate existence;

5. Stock represents a minority holding;

6. Lands are principal assets of the corporation and are producing no revenue; and

7. General condition of the company.

E. The petitioner is not entitled to recover, even if the pledges attacked are fraudulent and void, because of the antecedent pledge shown by the undisputed testimony of the witnesses called by petitioner, the endorsement on certificate No. 5 and the possession of that certificate by the respondent.

Granting for the sake of the argument that the pledges attacked in the bill are void, still the petitioner would not be entitled to recover the property pledged, or its value, but would only be entitled to any surplus remaining after the sale of the collateral to satisfy the antecedent pledge.

We repeat that the existence of this antecedent pledge cannot be disputed, not only because of the

evidence, but also of the allegations contained in the bill that the securities were sold not only for the payment and satisfaction of the purported obligations and indebtedness set forth in the pledge agreements, "but also the following additional purported indebtedness or obligations."

Paragraph VIII of the bill (R. 9) alleges that the pledge of June 29th, 1926, was given when the corporation "already possessed property of said Henry Joseph Barceloux as security for such indebtedness of a value of over twice the total amount of such indebtedness."

If the testimony of the Barcelouxs is to be rejected, then the antecedent pledge is sustained by the admission of the pleadings, book entries, the endorsement of the certificate and its possession by the respondent.

F. Freeman was a necessary party to the action.

This point was not presented in the printed briefs filed in the Circuit Court of Appeals, because it was suggested by that Court on reargument and by permission of the Court typewritten briefs were filed.

We have already directed attention to the fact that in the bill the validity of the Freeman assignment is recognized and that the petitioner is only entitled to recover the value in excess of the Freeman demand.

The bill alleges that an accounting is necessary to ascertain the amount due the respondent and Freeman.

Assuming that the transaction was fraudulent, the trial Court could not properly do justice and equity

to all of the parties involved, after Freeman was dismissed as a party defendant.

It is stated that this dismissal was without the objection of the respondent. The respondent had no right to object. No affirmative relief was sought against Freeman by the respondent and the matter of dismissal rested wholly in the control of the petitioner.

Freeman had a direct interest in the property by reason of his assignment. If the pledges are void, then Freeman, and not the petitioner, is entitled to the possession of the stock pledged, and to sell the same in the manner provided by law to satisfy his demand, paying any surplus to the trustee.

This is recognized by the prayer of the bill which only asks that petitioner be given the value, less the Freeman demand (R. 13).

In any event, according to the theory of the bill, and on the assumption that the pledges are void, the title to the 2499 shares is in Freeman.

The Court could not determine the damages claimed by the petitioner in the absence of Freeman without prejudice to the rights of all the parties involved.

Section 389 of the *Code of Civil Procedure* of the State of California provides that the Court may determine any controversy before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court *must* order them

brought in, and to that end may order amended and supplemental pleadings.

This section is mandatory.

In *O'Connor v. Irvine,* 77 Cal. 435, reference is made to the familiar rule that a Court of Equity will not permit litigation by piecemeal, and that it is the duty of the Court on its own motion to order the necessary parties brought in, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The Court finally states:

> "The failure of the Court so to do is fatal to the judgment."

In *McCabe v. Healy,* 138 Cal. 89, it is stated that where an individual has an interest or right in the subject matter of the litigation, which is liable to be destroyed or diminished by the plaintiff's success in the litigation, he has an interest which makes him a necessary party.

That this duty is mandatory on the Court is also announced in the following California cases:

Solomon v. Redona, 52 Cal. App. 306;
Ambassador Petroleum Co. v. Superior Court, 208 Cal. 671.

To the same effect is *Bland v. Fleeman,* 29 Fed. 669.

As decided by this Court in *Niles-Bement Pond Co. v. Iron Moulders Union,* 254 U. S. 77, 65 L. Ed. 147, there is no prescribed formula for determining

whether a person or a corporation are necessary parties to the action.

In *Young v. New Pedrara Onyx Co.,* 48 Cal. App. 1 (28), it was held that in a controversy as to the capital stock of a corporation that a third person who held stock under pledge was a necessary party to the action.

CONCLUSION.

The respondent is entitled to prevail in this action. If not entitled to prevail, the judgment rendered by the trial Court is inequitable in that instead of restoring the property to the respondent, it awards more than the value thereof at the time of the pledges.

Therefore, if the judgment be affirmed, petitioner not only recovers the full value of the stock, but a profit based on a temporary increase in its value, which was never realized by the respondent, and might not have been realized by Henry Joseph Barceloux had it not been pledged.

As stated by the Supreme Court of the State of California in *Tulley v. Tranor,* 53 Cal. 274, in dealing with the subject of conversion:

> "It cannot be said in a given case that the party injured would have retained his property until the date of the trial of the action had it not been converted, or that he would have sold at the highest price or the lowest price. It is better than to fix a rule of damages—one in itself simple,

and which on the whole shall approximate the actual damages."

Dated, March 3, 1933.

Respectfully submitted,

STEPHEN W. DOWNEY,
Solicitor for Respondent.

HUSTON, HUSTON & HUSTON,
W. T. BELIEU,
PERCY NAPTON,
Of Counsel.

(Appendix Follows.)

Appendix

Code of Civil Procedure of the State of California:

SECTION 389. Court, When to Decide Controversy or to Order Other Parties to be Brought in. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment. [Amendment approved 1907; Stats. 1907, p. 704.]

SECTION 2055. Examination of Adverse Party. A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may

be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel, but only as to the matters testified to on such examination.

Civil Code of the State of California:

SECTION 1712. Restoration of thing wrongfully acquired. One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

SECTION 1914. Loan presumed to be on interest. Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. [Amendment approved 1874; Code Amdts. 1873-74, p. 244.]

SECTION 3333. Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

SECTION 3336. Damages for conversion of personal property. The detriment caused by the wrongful conversion of personal property is presumed to be:

First—The value of the property at the time of the conversion, with the interest from that time, or,

an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second—A fair compensation for the time and money properly expended in pursuit of the property. [Amendment approved June 5, 1931; Stats. 1931, p. 1358.]

SECTION 3432. Payments in preference. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.

SECTION 3439. Transfers, etc., with intent to defraud creditors. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

SECTION 3440. Transfers presumed fraudulent. Transfers of wines. Bulk sales. Public auctions. Transfers under orders of court. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and

followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer;

Transfers of wines. Provided, however, that the provisions of this section shall not apply to the transfers of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care, and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and verified in the same form as provided for chattel mortgages, and which shall be recorded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated;

Bulk sales. Provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor

or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee or mortgagee, shall record in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid;

Public auctions. Provided, nevertheless, that if such intended sale is to be at public auction the notice above required to be recorded shall state that fact, the time, terms, and place of said sale, the names and addresses of the vendor and auctioneer, and a general statement of the character of the merchandise or property intended to be sold; but such sale shall in no event occur within seven days of the date of recordation of said notice; and any auctioneer selling said stock in trade or fixtures and store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant shall be personally liable for all damages incurred by any creditor of said merchant in the event said notice is not recorded as aforesaid;

Transfers under order of court. Provided, further, that the provisions of this section shall not apply or

extend to any sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant made under the direction or order of a court of competent jurisdiction or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment, statutory or otherwise, nor to any mortgage or chattel mortgage made for the benefit of creditors generally, nor to any sale, transfer, assignment or mortgage of any property exempt from execution. [Amendment approved May 23, 1925; Stats. 1925, p. 725.]

Section 70e Bankruptcy Act.

e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.